Douglas Foods Corp. *and* Local 876, United Food and Commercial Workers Union, AFL–CIO–CLC. Cases 7–CA–38788(1)(2), 7–CA–38953, 7–CA–39322, and 7–RC–20872

March 13, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 6, 1998, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order[1] as modified.[2]

1. We agree with the judge, for the reasons he states, that Douglas George threatened the lease route operators, interrogated Lisa Bowman, and terminated Michelle Benkert in violation of the Act.

Contrary to our dissenting colleague, we find that the Respondent's president, Douglas George, was not simply "indicating his view that the lease operators were independent contractors" when he told them that "they would have a problem retaining that relationship and yet be involved in a union contract . . . ." First, it is immaterial what the intent of George's statement was, because an employer statement violates Section 8(a)(1) if it would have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, without regard to the Respondent's intent. *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). Second, by his statement, George was certainly telling the lease operators that they would undermine their relationship with the Company and thereby suffer loss of income if they chose union representation. That message would surely have the effect of discouraging the lease operators from exercising their Section 7 right to choose union representation. George's comments were particularly coercive when viewed in the context of Sales Manager Bill Tofilski's earlier unlawful threat to lease operators that if the Union was voted in "lease contractors are gonna be fucked."

With regard to Benkert's discharge, we do not agree with our dissenting colleague that "there is no comparability with the other incidents cited by the judge in finding disparate treatment." As the judge noted, the Respondent had "been a very understanding employer when dealing with its employees." Thus, George admitted that the Respondent "very seldom" discharged employees and Tofilski testified that it "almost never" fired anyone. Benkert was not even warned, after her first timeclock discrepancy, that she could be discharged if she engaged in the same conduct again. In contrast, the Respondent warned other employees more than once that they would be discharged if they repeated their conduct, but nevertheless did not discharge them when they did so. For example, after employee Eric Brown kept cooked meat too long a second time, the Respondent warned him on September 11, 1995, that he would be subject to discharge if he did it again. Less than 2 months later, he engaged in the same conduct, but the Respondent simply gave him another warning, and less than a month after that he did it again and the Respondent only warned him again. Despite the fact that his conduct could have had serious health implications, the Respondent never suspended or discharged him despite warning him that he would be subject to discharge. In contrast, the Respondent discharged Benkert for a second offense despite the fact that it had not even warned her that she could be terminated. We agree with the judge that, in light of this disparate treatment, the Respondent has not carried its burden of showing that it would have discharged Benkert even in the absence of her union activities and support.

The shifting reasons that the Respondent has given for discharging Benkert further support the judge's conclusion that the Respondent has not met its *Wright Line* burden. When the Respondent discharged Benkert on October 21, 1995, it informed her only that she was being discharged for her timeclock violations. At the hearing, however, the Respondent asserted that it discharged her for her timeclock violations *and* for shortchanging customers on food portions. Such shifting explanations demonstrate the pretextual nature of the Respondent's explanation for the discharge, and support our conclusion that the Respondent has not shown that it would have discharged Benkert in the absence of her union activities and support. *Stoll Industries, Inc.*, 223 NLRB 51, 58 (1976).

2. We find no merit to the Respondent's exceptions to the judge's issuance of a *Gissel*[3] bargaining order in this case. In *Gissel*, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair

[1] In his recommended Order, the judge recommended that the Charging Party Union's objections to the election in Case 7–RC–20872 be sustained and the election be set aside. There are no exceptions to this portion of the judge's Order. We accordingly adopt the judge's Order in this respect.

[2] We correct minor inadvertent omissions in the judge's Order and notice. In all other respects, we adopt the judge's Order.

We agree with the judge, for the reasons he states, that the Respondent's lease route operators are employees rather than independent contractors. They were stipulated to be unit employees, and the facts show that they are employees. Moreover, the judge's finding in this respect is consistent with our decisions in *Roadway Package Systems*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998).

[3] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')."[4] The Supreme Court stated that in fashioning a remedy in the exercise of its discretion in category II cases, the Board

> can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.[5]

In agreeing with the judge that a *Gissel* Category II bargaining order should be issued, we follow our analysis in *M.J. Metal Products, Inc.,* 328 NLRB 1184 (1999). We find that the Respondent's course of misconduct, both before and after the election, clearly demonstrates that the holding of a fair election in the future would be unlikely and that the "employees' wishes are better gauged by an old card majority than by a new election."[6] In this regard, we observe that the unfair labor practices committed in this case include "hallmark" violations such as the discharge of two union supporters, and the sham sale of the entire hot truck operation, in a relatively small unit (about 32 employees), as well as threats to close the hot truck routes and impose pay cuts if the Union were selected.[7] The Respondent also committed numerous other serious and pervasive unfair labor practices: interrogating employees about their union activities and the union activities of others as well as creating the impression that employee union activities were under surveillance; threatening employees with more intense truck inspections and change in status if they supported the Union; suggesting it would be futile to select the Union; threatening employees with adverse consequences if they honored a Board subpoena; and granting at least one employee a pay raise in order to discourage her support for the Union.

The coercive effect of the Respondent's misconduct cannot be denied. These serious violations, which directly affected the entire unit, began shortly after the Union requested recognition on July 3, 1996,[8] and continued after the election on August 23. Indeed, the Respondent unlawfully discharged two union supporters and engaged in a sham sale of the entire hot truck operation commencing 2 months after the election. This conduct "goes to the very heart of the Act" and is not likely to be forgotten.[9] "Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity."[10] The impact of this action was magnified by its proximity to the election. Id. This conduct by the Respondent sent employees "the unequivocal message that it was willing to go to extraordinary lengths in order to extinguish the union organizational effort." Id. It is reasonable to infer that such a message will have a lasting effect on the unit employees' exercise of their right to organize. Id.

The severity of the misconduct is compounded by the involvement of high-ranking officials.[11] The Respondent's unfair labor practices emanated from the highest level officials, with many attributable to Douglas George, the Respondent's president and owner. George himself engaged in unlawful threats, statements and interrogations. George also fired the two leading union supporters and "sold" the entire hot truck operation. "When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[12]

Although the discharged employees and those adversely affected as a result of the Respondent's unlawful sale of the hot truck operation are entitled to reinstatement and backpay, these remedies would not, in our view, erase the coercive effects of the Respondent's conduct. The reinstated employees would not likely risk again incurring the Respondent's wrath and another period of unemployment by resuming their union activities. Particularly telling in this regard is the Respondent's long-term unlawful conduct. Thus the Respondent greeted the Union's request for recognition on behalf of employees in July with coercive conduct designed to thwart the organizing effort. After the August election, the Respondent's misconduct continued unabated. In September the Respondent announced that it was selling the hot truck operation and in both October and November the Respondent fired a leading union adherent. An

[4] *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (quoting *Gissel*, 395 U.S. at 613–614).

[5] 395 U.S. at 614–615.

[6] *Charlotte Amphitheater Corp. v. NLRB*, supra, 82 F.3d at 1078.

[7] The term "hallmark violations" has been used to describe unfair labor practices that are highly coercive and have a lasting effect on election conditions. See *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980).

[8] All dates are in 1996 unless otherwise indicated.

[9] *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

[10] *Consec Security*, 325 NLRB 453 (1998).

[11] Id. at 454–455.

[12] Id. See *Electro-Voice*, 320 NLRB 1094, 1096 (1996); *America's Best Quality Coatings Corp.,* 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995).

employer's continuing hostility towards employee rights in its postelection conduct "evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort." *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995).

Finally, we agree with the judge's finding that there is no merit to the Respondent's claim that the bargaining unit has changed because of employee turnover. Since the sale was a sham and was unlawful, any change will be remedied with restoration of the status quo ante. Moreover, the Respondent cannot rely on its own unlawful conduct to avoid its consequences. "It would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has resulted from the employer's unlawful discharge[s]. . . ." *NLRB v. Balsam Village Management Co.,* 792 F.2d 29, 34 (2d Cir. 1986).

In concluding that a *Gissel* order is warranted, we have examined its appropriateness under the circumstances existing at the present time and we have considered the inadequacy of other remedies. See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166 (D.C. Cir. 1998). We also give due consideration to employee Section 7 rights. In *Gissel*, the Supreme Court rejected the argument advanced by the employers that a bargaining order is a punitive remedy that "needlessly prejudices employees' Section 7 rights." 395 U.S. at 612. The Court stated that a bargaining order not only deters "future misconduct," but also remedies "past election damage." Id. The Court reasoned as follows:

> If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.[33] There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we have pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." [395 U.S. at 612–613 (quoting *Franks Bros. Co. v. NLRB,* 321 U.S. 702, 705–706 (1944).]

[33] It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. [Citation omitted.] Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." Bok, *The Regulations of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv.L.Rev. 38, 135 (1964).

This passage clearly shows that in approving the Board's use of the bargaining order remedy in category II cases, the *Gissel* court explicitly took into account the rights of employees who both favored and opposed union representation. The Court stated that if an employer's unfair labor practices have the tendency to undermine a union's majority strength and destroy election conditions, then "the only fair way to effectuate employee rights" is to issue a bargaining order.[13] In these circumstances, the interests of the employees favoring unionization are safeguarded by the bargaining order. The interests of those opposing the union are adequately safeguarded by their right to file a decertification petition pursuant to Section 9(c)(1) of the Act. On the other hand, if the facts of a case fall within Category III, i.e., the employer committed only "minor or less extensive unfair labor practices" with only a "minimal impact on the election machinery," then a bargaining order may not issue, notwithstanding the fact that a majority of employees signed authorization cards in support of the union. 395 U.S. at 615. In sum, the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights "to bargain collectively" and "to refrain from" such activity.

Accordingly, for all these reasons, we agree with the judge that a *Gissel* bargaining order is an appropriate and necessary remedy in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

[13] Fifteen years earlier, the Court observed in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), that the Act placed "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers." Thus, the statute itself subordinates the rights of the minority to those of the majority. See Sec. 9(a) of the Act.

orders that the Respondent, Douglas Foods Corp., Garden City, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(g) and reletter the subsequent two paragraphs.

"(g) Granting employees increases in wages to discourage employees from supporting the Union."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

I agree with the judge and my colleagues that the Respondent violated Section 8(a)(1) and (3) in several respects. However, I disagree with the judge and my colleagues on four points.

1. I find no threat in Douglas George's statement about the "relationship" of lease route operators. The statement was made at one of the August[1] meetings with employees. The record shows that George was speaking to assembled lease route operators and other employees when he made the "relationship" statement. He stated: "I felt they didn't understand that they were independent contractors . . . they would have a problem retaining that relationship and, yet, be involved in a union contract that would have anything to do with . . . wages and benefits." The judge found that these words constituted a threat that George would change the lease route operators' status to independent contractors if they selected the Union. I find no such threat. Rather, George was indicating his view that the lease route operators were independent contractors who cannot be represented by a union under Section 9 of the Act. The employees would reasonably understand that this was the message being conveyed by George. Although it was subsequently held that they are employees, this does not mean that the contrary view was held in bad faith. Thus, George's statement, based on the good-faith belief that the lease route operators were independent contractors, was not unlawful.

My colleagues read into George's comments a threat to reduce drivers' income. However, it is clear that George's reference to income was simply his assertion that independent contractors cannot be "involved in a union contract that would have anything to do with . . . wage and benefits."

2. Second, I find no unlawful interrogation in George's early July questioning of Lisa Bowman, concerning her signing a union authorization card. The record shows that Lisa Bowman commenced working for the Respondent on July 1. She was assigned to the truck operated by Debra Beck and Michelle Benkert for training. At the outset, Beck and Benkert encouraged Bowman to sign a union authorization card, and she did so in their presence. Thereafter, Bowman went to the home of Pam Cummins, a close personal friend and independent operator for the Respondent. Bowman told Cummins about her having signed a union authorization card. Cummins called George and Bill Tofilski and told both of them that Bowman had signed a union authorization card. Bowman then went to Tofilski and George, and initiated a conversation with them. Bowman suspected that Tofilski and George were aware that she had signed a card. She volunteered that she had received the card from Beck. George asked if she had signed the card. She said that she had done so.

In context, George was merely confirming the fact that Bowman had signed a card. In fact, George knew that she had, and Bowman suspected that he knew. The single question by George implied no threat or coercion. George asked it, Bowman replied, and that was the end of the matter. In these circumstances, I find no coercion.

3. Third, I find no unlawful discharge in the Respondent's October 23 termination of Michelle Benkert. George terminated Benkert on October 23. The Respondent concedes that the General Counsel established a prima facie case that hostility to union activity was a motivating factor in the Respondent's discharge of Benkert.[2] However, the Respondent argues that the Respondent failed to show that it would have discharged Benkert even in the absence of union animus.[3] I agree with Respondent. It is undisputed that, prior to the discharge of Benkert, the Wage and Hour Division of the United States Department of Labor investigated the Respondent, and the Respondent made payments to employees in settlement of alleged infractions.[4] Moreover, on October 8, pursuant to the settlement, the Respondent issued an "Employee Handbook Amendment." This amendment stated that "Government regulations require that the company keep an accurate record of hours worked by employees." The amendment required that employees "must punch in no earlier than 10 minutes prior to their starting time and punch out no later than 10 minutes after their scheduled work day had ended." The Respondent also required that employees acknowledge by signature their receipt of their copy of the new policy by October 11. Respondent warned that "any employee failing to comply with this employee rule will be disciplined." Benkert received and signed for her copy of the new policy on October 9. However, on October 14, Benkert punched in 13 minutes before her scheduled arrival time. The Respondent promptly reprimanded Benkert. On the same day, she received a written notice setting forth her "punch in" obligations and warning her that "anything

[1] All dates are in 1996 unless otherwise indicated.

[2] My colleagues note allegedly shifting reasons for Respondent's discharge of Benkert. At most, this would help to support a prima facie 8(a)(3) case. I have acknowledged Respondent's concession on this point.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[4] The Respondent made payments to employees of $42,000 and incurred $18,000 in legal fees.

else is unacceptable." Nevertheless, on October 18, a mere 4 days later, Benkert punched out 17 minutes after her scheduled departure time. George terminated Benkert on October 23, telling her that her October 18 time-clock violation was the reason for her discharge.

In sum, the Respondent had experienced an investigation by the Wage and Hour Division of the United States Department of Labor, and the Respondent made substantial payments in settlement of the case. Duly concerned about avoiding future investigations and liability, the Respondent then issued an "Employee Handbook Amendment" on the matter, informing employees what was expected of them. The Respondent emphasized the seriousness of the issue by requiring that employees expeditiously acknowledge receipt of their copies of the new policy with their signatures, and warned employees that infractions would warrant discipline.[5] As George testified, the Department of Labor's investigation had a substantial impact on the Respondent's business. Having given ample warning of the gravity of the situation, the Respondent could expect employees to comply. Yet, Benkert not once but twice violated the new policy. Moreover, given the surrounding circumstances of the Department of Labor's investigation and the Respondent's response to it, there is no comparability with the other incidents cited by the judge in finding disparate treatment. Individual examples of tardiness and absenteeism, violations of health and safety guidelines for food handling, and the loss of a sum of money, are not similar to Benkert's violations in light of the recent problem with the Department of Labor. The Respondent had paid a substantial sum in settlement of the Department of Labor's investigation of its time policies. The Respondent had taken all appropriate steps to secure compliance with the required changes by the employees. The Respondent was legitimately concerned that no liability recur. These circumstances are absent from the incidents cited by the judge. Accordingly, I find that the Respondent discharged Benkert for cause and I would dismiss this allegation of the complaint.[6]

4. Fourth, I would not find that a *Gissel*[7] bargaining order is necessary to remedy the effects of the Respondent's unfair labor practices. In finding that a *Gissel* bargaining order is warranted here, my colleagues say that there are "hallmark" violations—the discharge of two union supporters, the sham sale of the entire hot truck operation, threats to close the hot truck routes, and the threat to impose pay cuts if employees selected the Union.

As noted, I find that the Respondent's discharge of Michelle Benkert did not violate the Act. Furthermore, I am unpersuaded that the Respondent's sham sale of its hot truck operation rises to the level of a "hallmark" violation. As the judge acknowledged in his remedy section, the sham sale was largely a paper transaction, and actual operations remained virtually unchanged. The paper transaction can be easily reversed by Board order, and we have done so. Thus there can be no lasting effects on conditions for an election. Finally, the threats were made by Supervisor and Sales Manager Bill Tofilski and not by Owner and President Douglas George. Moreover, Tofilski did not make these threats at the August employee meetings. Rather, Tofilski made the threats in discussion with only one employee, Kimberly Brackenrich.

Based on the above, I am not persuaded that there are "hallmark" violations.[8]

Similarly, as noted, I would dismiss two of the "non-hallmark" allegations—George's "relationship" statement to lease route operators, and George's alleged interrogation of Lisa Bowman.

The "non-hallmark" violations that I would find had only a limited impact. George threatened one employee, Debra Beck, that there would be adverse consequences if she honored her Board subpoena. Although another employee, Jennifer Tjernlund, was present when the threat was made, she was not subjected to it. Similarly, George gave an unlawful pay raise to only one employee, Ebitsam Kassouma. Likewise, Supervisor and Sales Manager Bill Tofilski interrogated only one employee, Kimberly Brackenrich, and he made his threat about more intense truck inspections to Brackenrich and to no one else. Tofilski also gave only two employees, Brackenrich and Jennifer Tjernlund, the impression that their union activities were under surveillance. In short, these violations were heard by only approximately 4 employees, in a unit of 32 employees. Accordingly, I find the misconduct of George and Tofilski can be adequately remedied by our customary notice posting and cease-and-desist order.

A *Gissel* bargaining order is an extraordinary remedy. The much-preferred route is to provide traditional remedies for the unfair labor practices and to hold an election once the atmosphere has been cleansed by those remedies. I am persuaded that this route is warranted in this case, and that a *Gissel* bargaining order is unnecessary and unwarranted.[9]

[5] This requirement was not present with respect to any other policy of Respondent. The requirement thus demonstrates the gravity with which Respondent viewed this particular matter.

[6] See *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1407–1411 (5th Cir. 1996).

[7] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[8] The Board has previously held that "hallmark" violations do not always mandate the imposition of a bargaining order. *Philips Industries*, 295 NLRB 717, 718 (1989).

[9] *Pyramid Management Group,* 318 NLRB 607, 609–610 (1995).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Food and Commercial Workers Union, Local 876, or any other union.

WE WILL NOT threaten you with a reduction in benefits or other reprisals in order to discourage you from engaging in union activity.

WE WILL NOT coercively question you about your union support or activities, or the union support or activities of other employees.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT grant increases in wages to discourage employees from supporting the Union.

WE WILL NOT suggest that it would be futile to select the Union as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, restore and resume our hot truck catering operations as they existed prior to October 1, 1996.

WE WILL, within 14 days of the Board's Order, offer full reinstatement to all hot truck cooks and drivers who were terminated at the time of, or as a result of our sale of these routes, to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make the above-mentioned hot truck cooks and drivers whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time drivers, cooks, mechanics, maintenance and store employees, including lease route operators.

WE WILL, within 14 days from the date of the Board's Order, offer Debra Beck and Michelle Benkert full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Debra Beck and Michelle Benkert whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest. WE WILL also make Debra Beck whole for loss of overtime pay since August 1996.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Debra Beck, Michelle Benkert, and other hot truck cooks and drivers who were unlawfully discharged, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way. WE WILL take the same action with regard to the October 24, 1996 disciplinary notice issued to Debra Beck.

DOUGLAS FOODS CORP.

Jerome Schmidt and *Jeff Wilson, Esqs.,* for the General Counsel.
Theodore R. Opperwall and *Jeffrey M. Peterson, Esqs. (Kienbaum, Opperwall, Hardy & Pelton, P.L.C.),* of Birmingham, Michigan, for the Respondent.
David Radtke, Esq. (Klimst, McKnight, Sale, McClow & Canzano, Southfield, Michigan), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on May 27–30, July 14–18 and 21–24, August 5–8, and September 8–9, 1997. The charges were filed July 24, July 30, September 3, and December 24, 1996,[1] and the complaint was issued October 31, 1996, and amended on April 22, 1997.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a mobile caterer which prepares food at its facility in Garden City, Michigan, and then distributes it by truck. Douglas Foods annually has gross revenues in excess of $500,000 and purchases goods and supplies in excess of $10,000 from companies which received those goods directly from locations outside of the State of Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of

[1] All dates are in 1996 unless otherwise indicated.

the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Prelude to the Union Organizing Campaign

Douglas George, the president of Douglas Foods (DFC), established the Respondent company in the Detroit area in 1963. The company incorporated in 1971, by which time it employed a number of drivers. These employees drove small trucks (cold trucks) on routes assigned them by DFC and sold prepackaged food to employees of businesses on these routes during breaks and at lunchtime. Between 1972 and 1978, DFC's drivers were represented by a local union of the International Brotherhood of Teamsters. In 1978, George sold almost of all his service routes. Many of the routes were sold to the drivers. DFC's relationship with the Teamsters ended as the result of these sales.

In the 1980s, DFC repurchased about five of the routes sold in 1978. It also purchased and developed other routes. On some of these routes the cold trucks were replaced by larger step-in vans equipped with a kitchen in the back (hot trucks). The hot trucks were staffed by a driver/cashier and a cook, who prepared hot food to order (such as hamburgers).

By mid-1995, Douglas Foods was operating about 12 hot trucks and a similar number of cold trucks out of its facility in Garden City. A number of other drivers (hereinafter owner-operators) also operated out of this facility. All the drivers sold food prepared in a kitchen/commissary on the premises operated by Ezzo's Food, a company owned by Douglas George and managed by his wife, Laura George. The drivers loaded their trucks in the early morning at DFC's Garden City facility and then drove to typically 15–25 stops on their routes before returning to DFC in the early afternoon. There were also one or more afternoon/evening routes.

In October 1995, DFC sold all its cold truck routes to JK Food Service, a company established at this time by John Schemanske, Mrs. George's brother, and Schemanske's wife. For several years, prior to the sale of the cold trucks, Schemanske had been the general manager of DFC.

In the 1980s and early 1990s, all or most of DFC's drivers were employed pursuant to a "lease agreement." However, by the spring and summer of 1996, approximately half the drivers of the hot trucks were classified as employees by DFC and were paid $9 an hour when hired and $11 per hour at the end of a probationary period. The cooks working on the hot trucks were also paid an hourly wage by DFC. In 1994 and 1995, DFC hired a human resources director, a route supervisor, and a cook supervisor. By January 1996, it had laid off all three of these supervisors. They were not replaced.

In contrast to "employee drivers," "lease operators" were charged a daily lease fee by DFC, which depended upon their sales experience. The operators' written agreements with Douglas Foods provided that the lease fee would be anywhere from zero to $150 per day. This fee was periodically adjusted by Respondent to take into account a driver's receipts. Jennifer Tjernlund's[2] lease fee ranged from $90 to $150 per day in 1995 and 1996 (GC Exhs. 46 & 47). In the spring of 1997, Lease Operator Sheila Thomas was paying a lease fee of approximately $80 per day. The drivers earned whatever they collected from the sale of food minus the lease fee, the wholesale price of the food and supplies, sales taxes, and a number of service charges. They also paid DFC a labor fee for their cook. Lease operators were allowed to hire their own cooks but there is no indication that any did.

On December 4, 1995, DFC hired Debra Beck as an hourly driver. Within a few weeks Ms. Beck contacted the Union to discuss the possibility of commencing an organizing campaign. In the spring of 1996, union supporters began to distribute authorization cards to DFC's drivers, cooks, mechanics, line employees (who clean the trucks), and store employees, as well as to drivers of JK Food Service. The Union also held a number of organizational meetings.

At about the same time that the union campaign started, DFC broke ground for a $810,000 expansion of its Garden City facility. As part of this expansion, the garage area is being enlarged dramatically so that 60 trucks may park indoors, as opposed to 12, prior to the expansion. The store area from which DFC distributes food to catering route drivers is also being enlarged.

Between April and July, DFC's sales were $100,000 less than anticipated. Some employees attributed the decline to an increase in the price of food items being sold off the trucks. DFC management attributed the decline to a poor attitude amongst some of its employees.

By July 3, 19 employees of DFC had signed authorization cards. On that date, union organizers Mark Charette and Tom Rekuc went to DFC's Garden City facility and presented Douglas George a petition informing him that a substantial number of employees wished to be represented by Local 876 and requesting certification of the Union as their representative. The petition was addressed to "Douglas Foods/J & K Foods" and described the bargaining unit as "all full-time and regular part time hot and cold truck drivers, cooks, mechanics, maintenance and store employees." The petition was filed with the Board on the same date.

A hearing on the Union's petition was scheduled for Monday, July 22, at the Board's offices in Detroit. In the days just before that meeting, DFC's sales manager, William Tofilski, had a number of conversations with employees about the Union. The General Counsel alleges that Tofilski is a supervisor within the meaning of the Act and that he violated Section 8(a)(1) in egregiously interfering with employees' Section 7 rights.

B. Tofilski's Conversations with the Drivers and Cooks About the Union

On July 19, Tofilski approached driver Kimberly Brackenrich. At first they argued as to whether or not Tofilski was her supervisor. Tofilski denied that he was. Then he told Brackenrich that he couldn't do his sales job because of the "union bullshit." Tofilski asked Brackenrich if she had signed a union authorization card (Tr. 1780) and why she was interested in the Union.

Brackenrich told Tofilski that she was interested in health benefits for herself and her son. Tofilski replied that Doug George could not afford such benefits. He also said that if the Union organized DFC, George would not bargain about benefits, would eventually close the shop and the employees would all be jobless (Tr. 1782). Tofilski said if the Union went on strike he wouldn't let Brackenrich cross the picket line even if she wanted to, and George would close the facility.

[2] Jennifer Tjernlund is also referred to as Jennifer Donaldson (her married name prior to 1996) and Jennifer Gossett (her married name in the fall of 1997).

Tofilski told Brackenrich that he knew that all the cooks, except one had signed authorization cards and that 8 of 13 drivers had done so (Tr. 1782–1783, 1628).[3] He then asked her how many JK Food Service employees had signed cards. Tofilski placed his hands on Brackenrich's shoulders and told her that when she ran to her union pals and told them her story he would lie in court and say the conversation never happened (Tr. 1783).

As the conversation continued, Tofilski told Brackenrich that he knew Jennifer Tjernlund and Debra Beck had started the union drive and that he knew that they, Eve Orlando and Brackenrich had been pressuring cook Eric Brown into signing a card (Tr. 1784). Tofilski told Brackenrich that Doug George had closed the shop in 1978 (Tr. 1624) and suggested he would do it again in order to prevent DFC from being unionized (Tr. 1625–1626). Tofilski indicated that he knew about everything that went on at the union meetings (suggesting that somebody who attended was reporting to him) and that Brackenrich should reconsider her support for the Union because "where else would [she] make $500 a week." (Tr. 1786.)[4]

At some point, although not necessarily in the same conversation, Tofilski told Brackenrich that if the Union won there would be more intense management inspections of the drivers' trucks (Tr. 1631).

On July 22, Brackenrich taped conversations with her cook, Eric Brown, and Tofilski, without their knowledge.[5] She interrogated Brown as to whether he had told Tofilski about her union activities. The recording indicates that Brackenrich had become very anxious about her future at DFC as the result of her conversation on July 19 with Tofilski.

Brackenrich attempted to get Tofilski to repeat some of the things he said to her on July 19. He would not and denied, for example, telling Brackenrich that Doug George would close DFC if the Union won (GC Exh. 42, side B, GC Exh. 55, p. 33). In the tape of July 22, Tofilski's tone is friendly and jocular. Indeed, it is inconsistent with Brackenrich's account of the July 19 conversation. However, what I infer from this is not that Brackenrich's statement is inaccurate but that Tofilski had been warned or simply realized that union supporters may be documenting what he said to them and he may have been aware of the possibility that he was being taped. Indeed, he told Brackenrich on the 22nd that he "sat down with the lawyers for 7 hours and . . . had a class on what he could [say]." (GC Exh. 55, p. 31.) While there is no evidence on when this "class" occurred, Tofilski's guard was up on the 22nd, as it had not been on July 19.

Even at that, Tofilski suggested to Brackenrich and cook Michelle Benkert that Doug George might sell the routes and operate solely as a wholesale house if the Union won the election. Tofilski also told them that he might buy the trucks and make all the drivers lease operators.[6] At the time he said this, there is no evidence that Doug George had talked to him about buying any trucks or routes (which he subsequently did in early 1997).

In its brief at page 19, footnote 9, Respondent notes that at hearing Brackenrich testified that she did not consider her conversations with Tofilski to be scary, intimidating, or even unfriendly. Brackenrich's subjective reaction to the conversation is not determinative of whether Tofilski violated Section 8(a)(1) of the Act. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act, *American Freightways Co.,* 124 NLRB 146, 147 (1959). Not only did Tofilski's comments tend to be coercive, the record strongly suggests that the coercion was successful. Brackenrich appeared to be very frightened while testifying at hearing.[7]

Brackenrich no longer supports the Union in its effort to organize DFC (Tr. 1773). In December she left DFC and moved to Port Austin, Michigan, 150 miles North of Detroit. In May 1997, she was hired by Tofilski to be a driver on a hot truck, owned by his company, Patriot Catering.[8] She now drives a hot truck which operates out of Respondent's facility, which is owned, at least nominally, by her cook, Dawn Alman. One night a week, however, she still drives a route for Tofilski. Brackenrich has not moved from Port Austin and has some temporary living arrangements in the Detroit area. It was evi-

[3] Tofilski's figures probably were not correct. At least three cooks who were working for DFC in July apparently never signed a card; Eric Brown, Robin Skalmowski, and Kathy Billings.

[4] In making findings of fact regarding the July 19 conversation between Brackenrich and Tofilski, I have also relied on GC Exh. 160, which I admitted over Respondent's objection. This statement was prepared by Brackenrich a few days after this conversation at the home of Eve Orlando, a cook who was an ardent union supporter. The statement was drafted because Brackenrich was afraid she would be fired or that Respondent would close its doors to prevent union organization. She was also concerned that she might lose custody of her son to her ex-husband if she lost her job (Tr. 1794–1802, 1808, GC Exh. 55, pp. 2–3).

Respondent tried to establish that the document does not accurately represent Brackenrich's contemporaneous recollection of the conversation and that the ideas expressed, as well as the wording of the document, are Orlando's. Brackenrich's testimony convinces me that this is not the case and the document accurately reflects the substance of the conversation.

Rule 803(5) of the Federal Rules of Evidence appears to allow a statement such as Brackenrich's to be read into the record but not to be received as an exhibit. I fail to see why such formalities should be adhered to in a nonjury trial—particularly since Brackenrich did not repudiate any of the statement but merely testified that she could not presently recall some of the events recorded therein.

In *Alvin J. Bart & Co.,* 236 NLRB 242–243 (1978), the Board approved a judge's reliance on sworn statements similar to Brackenrich's unsworn statement. The Board noted that the modern trend in the law of evidence is to regard such statements as not constituting hearsay since the declarant is available for cross-examination as to the circumstances under which the document was drafted. To insist that the document be read into the record as opposed to receiving it as an exhibit appears to me to be a matter of form, not substance.

[5] Although Respondent objected to my receipt of surreptitious tapes and transcripts made from these tapes, they are clearly admissible. Indeed, it may have been reversible error to reject them, *Plasterers Local 90 (Southern Illinois Builders Assn.),* 236 NLRB 329 (1978); *Fontaine Truck Equipment Co.,* 193 NLRB 190 (1971).

[6] Brackenrich was an hourly driver, not a lease operator.

[7] That Brackenrich was thoroughly intimidated by Tofilski in July 1996 is further evidenced by the following exchange with the General Counsel:

> Q. . . . why is it that you were shocked about Bill Tofilski bringing up the union?
>
> A. Because, like I said, it was a very hush-hush thing. It was told not to be spoken of in the yard. And then when Bill and Doug knew what was going on, everyone just made a panic about it. So when he approached me and started to discuss the union with me, I was just shocked.

Tr. 1957.

[8] On June 24, 1997, Tofilski returned the truck and route on which Brackenrich worked to Doug George, who sold it to the Dawn Alman, the cook on that truck (Tr. 1618–1620).

dent that Ms. Brackenrich at present desires to stay in George's good graces. For this reason her testimony, which is largely harmful to Respondent's case, is particularly credible.

Lease driver Jennifer Tjernlund also surreptitiously recorded conversations with Tofilski and Doug George. Most of these conversations appear to be largely irrelevant to this proceeding. However, on the afternoon of July 19, Tofilski engaged Tjernlund in a discussion about the Union (GC Exh. 38(a), GC Exh. 43a, pp. 12–26). At the outset Tofilski indicated that he was aware that Tjernlund was involved in the organizing campaign. He also indicated, as he did to Brackenrich, that he was aware that his remarks to Tjernlund may have violated the Act, by stating that he would lie under oath that the conversation never occurred (GC Exh. 43a, p. 17).

Tofilski then suggested to Tjernlund that if the Union won, DFC would have to discontinue the lease operator arrangement (Id. p. 20). A few minutes later he said

> I'm worried for the people who don't want this, I know I'm gonna be fine at the end of it and I know a lot of people are gonna be fine and a lot of people are gonna get fucked. Like lease operators, cause when these people vote in this union, and I say when, because I think they probably think that would be the best thing for this place, um lease contractors are gonna be fucked. The people that make the money. . . .

Id. at 22.

This statement was clearly intended to make Tjernlund and other lease operators worry that they may suffer a loss in income in the event of a Union victory. Afterwards, Tofilski asked Tjernlund what she thought DFC employees would do. When she said she didn't know, he pressed her. The two then had the following exchange:

> TOFILSKI: What have you heard though?
>
> TJERNLUND: Um, I don't know, Doug's gonna close the door, Doug's gonna, He's gonna sell all the routes, like he did last time.
>
> TOFILSKI: That's what he did in 78.
>
> TJERNLUND: He's gonna do this. And I'm like think about it, he's got a million dollar project going up, you really think he's gonna close the doors. No. No., I just, He's got too much money invested in this do you think he's gonna lose it all? Because of this?
>
> TOFILSKI: He doesn't want to lose it, you know if he sold a lot of routes he'd make his money.
>
> TJERNLUND: Who's gonna buy a truck route Bill?
>
> TOFILSKI: I would.
>
> TJERNLUND: Who has the, right now who has the money to buy the hot truck route?
>
> TOFILSKI: me.
>
> TJERNLUND: Oh, Naa. That's the thing. Ya know, good for you.
>
> TOFILSKI: Doug's financed a lot of money. He financed all those routes . . . its a possibility.

Id. at 25–26.

Tofilski also had a number of conversations about the Union with Debra Beck. In the summer and fall of 1996 he made a number of hostile and disparaging comments to her, which I conclude were motivated by animus towards her union activities. Tofilski concedes, for example, that he told Beck in the summer of 1996, that if he started his own company he would not hire her. As discussed below, DFC management considered Beck to be as good or better than its other hot truckdrivers, at least until July 1.

C. Douglas Foods Violated Section 8(a)(1) Through William Tofilski

I also conclude, largely from the tape recorded evidence, the testimony of Jennifer Tjernlund, Kim Brackenrich, Debra Beck, and William Tofilski, that, as alleged in paragraph 10 of the complaint, Tofilski:

> Coercively interrogated DFC employees concerning their union sympathies and activities;[9]
>
> Created the impression that he had been engaging in surveillance of employees' union activities.
>
> Effectively threatened employees with the closing of the hot truck catering routes if DFC employees selected the Union as their bargaining representative.
>
> By suggesting that lease operators would have to become hourly employees in the event of Union victory, effectively threatened lease drivers with pay cuts
>
> Threatened employees with adverse consequences, such an more intense truck inspections, if the Union prevailed.[10]

Respondent argues the General Counsel has not established that Tofilski was a supervisor under the Act or even an agent of Respondent when discussing the Union with DFC employees. Therefore, it suggests that even if his statements were to otherwise violate the Act, they are not imputable to Douglas Foods. The evidence that Tofilski was an agent and a supervisor is overwhelming. Through Tofilski, DFC violated Section 8(a)(1) as set forth above.

Regardless of whether Tofilski was a supervisor, he was clearly an agent of DFC when interrogating employees about the Union, suggesting adverse consequences if the Union was selected as their bargaining agent and the futility of doing so. Tofilski's duties as Respondent's sales manager would reasonably lead employees to believe that he spoke and acted for management when discussing the Union, *Community Cash Stores,* 238 NLRB 265 (1978). Indeed, since Tofilski and George concede that Tofilski reported what he learned about the organizing drive to DFC's president, Tofilski was in fact acting for management in interrogating employees about their union activities. Finally, by the time Douglas George spoke to employees in August he was aware of the unfair labor practice charge filed on July 24, which was predicated on statements allegedly made by Tofilski. Indeed, at one of George's meetings with employees, Tofilski made some unspecified apology, which put Douglas George on notice that some of the allegations in the charge might be true. In failing to assure employees that Tofilski did not speak for the company, that DFC would not retaliate and would bargain in good faith if employees selected the Union, George in effect reinforced the impact

[9] In my discussion of Michelle Benkert's termination (fn. 19), I also conclude that Douglas George violated Sec. 8(a)(1) in coercively interrogating Lisa Bowman during the first week of July 1996.

[10] I have not discussed some items in the complaint, e.g., par. 10(i), alleging that Tofilski sought to dissuade employees from supporting the Union by promising them better routes, because I conclude the record does not establish that they occurred. Similarly, I conclude that the General Counsel has not established that Respondent violated the Act in changing its timeclock policy for unit employees.

of Tofilski's conduct. For this reason as well, I conclude that Tofilski was an agent of DFC.

Moreover, Tofilski was also a supervisor. Pursuant to Section 2(11) of the Act, a supervisor is one who has authority to perform any one of a number of functions in a manner that requires the use of independent judgment. An individual is a supervisor if he or she has the authority to hire, transfer, suspend, lay off, recall, promote, assign, reward, discipline, or discharge employees, or to adjust their grievances, *Providence Hospital,* 320 NLRB 717, 731–733 (1996), enfd. *Providence Alaska Medical Center v. NLRB,* 121 F.3d 546 (9th Cir. 1997); *Washington Nursing Home,* 321 NLRB 366 (1996).

Tofilski clearly used independent judgment in assigning customers to the hot truckdrivers. He juggled routes, removing stops from one driver's route and assigning them to another. By doing so he could significantly impact their earnings. Drivers serviced the customers Tofilski told them to service. He assigned Saturday work. Tofilski also used independent judgment in disciplining employees. He took Beck off the night route in August 1996, thus depriving her of overtime pay—apparently without consulting with anyone. Similarly, he removed Tjernlund from the night route. Moreover, the record is replete with notices of disciplinary action signed by Tofilski.[11]

D. Doug George's 8(a)(1) Violation Regarding Beck's Subpoena for the Representation Hearing

Several DFC employees were subpoenaed to appear at the representation hearing, including lease drivers Jennifer Tjernlund and Debra Beck. Both drivers went to Douglas George to discuss the subpoenas. Tjernlund informed George that she had arranged for a substitute to drive her truck. Beck suggested three people as possible substitutes for her, Rob Rehn, Val Baker, and Barbara Paquette. Rehn was apparently already slated to substitute for Marty Schlacter, a JK driver who had been subpoenaed. Baker was assigned to work on July 22 as a cook. At first, George refused to use Paquette as a substitute for Beck. He told Beck he would park her truck (not use it) instead and that she might not have a job on Tuesday, July 23. Ultimately Paquette did fill-in for Beck on July 22 (Tr. 2840–2841).[12]

From this exchange and well as other parts of the record, I infer that Douglas George bore a deep-seeded animus toward Beck as a result of her role in the organizing drive. George testified that he never shuts down a route if there is any alternative and that he even ran his trucks during the Detroit riots. Paquette, who had been his babysitter, had trained for at least 3 days on Beck's truck during the last week of June (R. Exhs. 29, 30, & 31). Although, he may have had legitimate reservations about Paquette's ability to handle the route, his threat to park the truck and possibly eliminate Beck's job, was made out of pique and was intended to intimidate Beck in the exercise of her Section 7 rights. Therefore, I conclude that Respondent, through George, violated Section 8(a)(1) as alleged in paragraph 10(l) of the complaint.

E. Stipulated Election Agreement

On July 22, the parties entered into a Stipulated Election Agreement (GC Exh. 8). The agreement provides that the appropriate collective-bargaining unit was "all full-time and regular part-time employees, including drivers, cooks, mechanics, maintenance, store employees, and lease route operators[13] but excluding guards and supervisors as defined in the Act. The parties also agreed that Douglas Foods and JK Food Service employees constituted separate bargaining units and that separate elections would be held for employees of these two companies on August 23. Finally, they agreed that DFC lease route operators working as of Saturday, July 20, and other employees working during the payroll period ending July 20, would be eligible to vote.

During the negotiations concerning the stipulated election agreement, Frank Mamat, then Respondent's counsel, told David Radtke, the Union's counsel and Mark Charette, a union organizer, that DFC was going to go ahead and sell the routes as planned, or that DFC should just go ahead and sell the catering routes (Tr. 2843). At this time there were no prospective buyers for the hot trucks or hot truck routes (Tr. 2844–2845). Radtke asked Mamat if he was making a threat.

Douglas George and his office manager, Linda Clark, prepared an "*Excelsior* List" of eligible voters which included 32 names. On August 16, DFC advised the NLRB that three individuals, who had terminated their employment, had been removed from the *Excelsior* list.

G. The Filing of the First Unfair Labor Practice Charge

On July 24, the Union filed its first unfair labor practice charge in this case. It alleged on about July 19, William Tofilski threatened employees that if the Union won, DFC would close its business, would never bargain in good faith, and that voting for the Union was futile. The charge alleged that Tofilski grabbed one of the employees [an obvious reference to Brackenrich] while making these threats and said that under oath he would deny making such threats.

The charge also alleged that Tofilski solicited employee grievances and offered prounion employees improved wages and working conditions on about July 18. Further the Union alleged that DFC had engaged in surveillance of prounion em-

[11] Tofilski signed many of these forms above the word "Supervisor" (GC Exhs. 63, 137,140, 141, 145, 146, 148, 152, 154). Indeed, it appears he commonly referred to himself as a supervisor until told not to by counsel sometime in July 1996. (See for example, GC Exh. 179, Beck disciplinary notice of August 14.) Also, I would note that in the summer of 1996, between 5 a.m. when Tofilski arrived at work until 7 a.m., when Doug George arrived at work, Tofilski was the management of DFC so far as the cooks and drivers were concerned.

[12] George disputes the testimony of Beck and Tjernlund that he told Beck she might not have a job on July 23. I credit the testimony of the two drivers on this issue. Virtually every witnesses in this case had some direct or indirect interest in its outcome. Thus, I have approached all the testimony with a significant degree of skepticism. Beck and Tjernlund may well have harmonized their accounts prior to hearing. Moreover, Beck, as the General Counsel's representative, was in the courtroom while Tjernlund testified. Nevertheless, George's testimony makes it clear he was very upset when approached by Beck and Tjernlund about the subpoenas. Moreover, his reluctance to consider Paquette as a substitute for Beck suggests to me that he intimated to Beck that honoring the subpoena might cost Beck her job. Finally, George's testimony at Tr. 69–70 establishes that Beck was implicitly threatened with loss of her job if she honored the subpoena.

[13] The next day the Union and Respondent signed an agreement that lease route operators were being included in the unit solely for purposes of the election proceeding and that Respondent was not conceding that they are employees for any other proceedings (R. Exh. 1). The Union and Respondent disagree as to whether the July 23 agreement binds Douglas Foods for purposes of the instant matter.

ployees and threatened these employees that it would dissolve their routes or take customers away from them. Respondent, in its answer to the General Counsel's complaint, neither admits nor denies that this charge was served on it on July 24. I infer that DFC received this charge shortly after July 24th.

H. The 8(a)(1) Allegations Regarding Douglas George's August Meetings with Employees about the Election

Douglas George held approximately 5–6 meetings in August with employees to discuss the upcoming union election.[14] Some of these meetings were conducted separately for lease route operators. At some meetings Doug George spoke primarily, but not exclusively, from a script. At the last meeting which was attended by lease route operators as well as other employees, George put down his notes and spoke extemporaneously (Tr. 1954–1956). At one meeting, he tried to explain to the lease operators that he thought they were independent contractors rather than employees. He explained that:

> they would have a problem retaining that relationship and yet be involved in a union contract that would have anything to do with wage and hour or wages and benefits.

Tr. 2861.

I conclude that George violated Section 8(a)(1) in making this statement. Particularly against the backdrop of the violative remarks previously made by Tofilski, as well as other coercive conduct by Respondent, it constituted a threat that he would change the lease operators' status in the event employees selected the Union. Even if it is regarded as a prediction or opinion as to events or legal considerations beyond his control, it had no objective basis in fact and was coercive, *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618–619 (1969); *Soltech, Inc.,* 306 NLRB 269, 272 (1992).

At one meeting George invited others to talk after he finished speaking. Bill Tofilski apologized to employees for saying some things he should not have. However, neither Tofilski nor Doug George repudiated any of the statements made by Tofilski in July, which George already knew were alleged to be unfair labor practices by the Union.

Two of the General Counsel's witnesses (Beck and Benkert) allege that George threatened to close his facility if the Union won the election. Another (Orlando) says he threatened to do so if the Union went on strike. A fourth, Ebtisam Kassouma, recalled George saying only that some businesses have gone out of business, even though they had a union. Kimberly Brackenrich, as well as all the management witnesses who were present, deny that Respondent's president ever threatened employees with closure of the facility or sale of the routes. I do not find the testimony regarding this alleged threat credible. As pointed out by Respondent, Ms. Beck's allegedly contemporaneous notes of these meetings (GC Exh. 206) do not reflect such a threat.

[14] Notes taken by Linda Clark, Respondent's office manager, indicate that two meetings were held on August 7, one on August 9, and two on August 15. Her notes of August 15 state "Sheila [Thomas] wants to incorporate lease straight talk meetings with others—all one group on Wednesday." From these notes as well as Beck's notes (GC Exh. 206), I conclude that the last meeting for all employees, including lease route operators occurred on Wednesday, August 21, 2 days before the election. There are no notes taken by Clark or other management officials for this meeting.

I. Respondent's President Douglas George Violated Section 8(a)(1) by Raising Ebtisam Kassouma's Salary 3 weeks Before the Election and at the Same Time Suggesting that she Vote Against the Union

Douglas George raised cook Ebtisam Kassouma's salary by 23 cents per hour on or about August 5. I credit Kassouma's testimony that when he did so he encouraged her to vote against the Union. I do not credit George's testimony that the raise was an increase that Kassouma was automatically entitled to at the end of 20 months with DFC.

One reason I find Kassouma's testimony more credible is that her 20 months at DFC were up in May 1996. At that time her pay was converted from a weekly rate to an hourly rate, but not increased. Her pay changed from $403 a week to $8.52 per hour, in part due to the investigation of DFC by the Wage and Hour Division (R. Exh. 19). If her salary increase was merely a scheduled adjustment, it should have occurred in May, when her salary was converted to an hourly basis, not in August, 3 weeks before the election.[15]

Granting benefits during the pendency of a representation election is prima facie evidence of intentional interference with Section 7 rights. Such action is presumed to be for the illegal object of influencing employees, *Philips Industries,* 295 NLRB 717, 731 (1989); *NLRB v. Exchange Parts Co.,* 375 U.S. 405 (1964). As Justice Harlan stated in *Exchange Parts*, supra.

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

375 U.S. at 409.

If Respondent can prove the existence of a well-established policy that accounts for the granting of the benefit regardless of whether the Union was on the scene, a benefit granted just before an election may not violate the Act. DFC has not established that Kassouma's pay raise meets this criteria.

J. The Election

On Friday, August 23, a representation election was conducted at Douglas Foods. Sixteen employees voted against the Union and 12 voted for it. Two people who tried to vote had their ballots challenged. On learning of the election results, two of the Union's most prominent supporters, lease driver Jennifer Tjernlund and her cook, Eve Orlando, quit.[16] In the separate election held for JK Food Service employees, the cold truck drivers voted against the Union 11–1.

K. The Union's Objections to the Election

On August 30, the Union filed objections to the August 23 election. It alleged that DFC had interfered with its employees' free and fair choice by engaging in surveillance of union supporters, threatening to close its business in the event of union victory, threatening not to bargain in good faith, suggesting that voting for the Union was futile, physically grabbing a prounion

[15] Kassouma's pay increase was not alleged as a violation in the Complaint. However, the issue was fully litigated. The General Counsel's motion (Br. 78) to amend to pleadings to include this as a separate violation is granted.

[16] Tjernlund filed an unfair labor practice charge against DFC alleging constructive discharge. The charge was dismissed initially and on appeal by the General Counsel.

employee while threatening her [another obvious reference to Brackenrich], telling employees [by Tofilski] that it would deny making threats or promises under oath, soliciting grievances and offering a prounion employee improved wages and working conditions, and threatening prounion employees with adverse actions with regard to their catering routes.

L. September 1996 Meeting to Announce Sale of Routes

In late September, Douglas George held a meeting for his employees at which he announced that William Tofilski and his sister, Mary Jo Merollis,[17] had each agreed to purchase three of his hot truck routes. George indicated to employees that there was no cause for concern about their jobs and suggested they talk to employees of JK Food Service to confirm this.

Soon afterwards, Bill Tofilski began driving one of the hot trucks with Ebtisam Kassouma as his cook. Merollis also starting driving on one of these routes. No written documents regarding these sales were executed until January 1997.

M. The Termination of Michelle Benkert

On October 23, 1996, Doug George fired Michelle Benkert, a DFC cook. The General Counsel alleges that this termination violated Section 8(a)(1) and (3). Benkert began working in the kitchen for Ezzo's Foods in June 1995. In March 1996, with the encouragement of Doug and Laura George, Benkert transferred to DFC as a cook on a hot truck. In May, she began working with Debra Beck, who was her truck's driver/cashier. Benkert signed a union authorization card on May 31.

Douglas George denies that he was aware that Benkert was a union supporter (Tr. 2929). I conclude otherwise. It is readily apparent from Tofilski's conversation with Brackenrich on July 19 and his conversation with Brackenrich and Benkert on July 22 (Exh. 55, particularly pp. 31–37), that Tofilski knew that Benkert had signed a union card. Tofilski and George both concede that Tofilski reported to George on the progress of the union organization drive. I infer he let George know the identity of every known or suspected union supporter.

Further, I infer that George was aware of Benkert's support for the Union from his interrogation of driver Elizabeth "Lisa" Bowman[18] at the beginning of July. Bowman went to work for DFC on July 1. She was assigned to Beck and Benkert's truck for training. Both Beck and Benkert encouraged Bowman to sign a union authorization card (Tr. 2267). Both were present in the truck when Bowman signed the card.

After she signed the card, Bowman went to the home of Pam Cummins, an independent operator of a cold truck. Although Cummins is not a blood relative, their relationship is so close that Bowman refers to Cummins as her aunt. Bowman told Cummins that she had signed the union authorization card. Cummins immediately called Bill Tofilski and Doug George. She told them Bowman had signed a card. Bowman then went to speak with Tofilski and then to Douglas George (Tr. 2448–2449).

Bowman told George that she received the card from Debra Beck. He asked her if she signed it (Tr. 2281–2284). Bowman replied that she had signed in order to go along with the crowd (Tr. 2450).[19] Even if Benkert's name was not mentioned in the conversation, George would have known Benkert was involved simply from the fact that she was the only person on Beck's truck besides Beck and Bowman. Moreover, I think is most likely that Benkert's name was mentioned in the conversation as at least lending support to Beck in her efforts to get Bowman to sign the card.

In order to establish that Benkert's discharge violated Section 8(a)(1) and (3), the General Counsel must prove her union activity, DFC knowledge of that activity, and that antiunion animus was a substantial or motivating factor in Respondent's decision to fire her. If it does so, DFC may avoid an unfair labor practice finding by showing that even in the absence of her union activity, it would have discharged Benkert for nondiscriminatory reasons, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). I conclude that the General Counsel has met its burden and that Respondent has not done so. Douglas Foods was aware that Benkert supported the Union. It was also aware of the aid and comfort she provided to Beck's union activities. By the time of her discharge, Benkert was the DFC employee most likely to retain union sympathies, aside from Beck. Douglas George was extremely hostile to union activity. The timing of the discharge, while the Union's objections and unfair labor practices were pending, is one factor leading me to conclude that Benkert's discharge was motivated by DFC's antiunion animus. The other factors are the disparate treatment of Benkert and the pretextual reasons given for her discharge, which are discussed below.

The reasons advanced by Respondent for the discharge are three warnings given to Benkert for short-changing customers on food portions and two violations of a new policy instituted by DFC for employees punching the timeclock. Benkert acknowledges that Doug George warned her three times about inadequate portions in the summer and fall of 1996. She does not, however, acknowledge that the warnings were deserved. The warnings were apparently given on or about August 6, September 13, and October 11 (R. Exh. 8). The warnings were not precipitated by customer complaints but rather by examination of unsold food at the end of the day.[20] Trucks operated by employee, as opposed to lease drivers, turned in unsold food

[17] Merollis had worked for DFC prior to 1996. In 1996, however, she was working as a social worker at a hospice until August. Merollis' and Bill Tofilski's mother, Lynn Tofilski, was DFC's morning coordinator until her retirement in August 1996. She had been working for DFC since 1971.

[18] Bowman was married between July 1996 and the hearing. Her name is now Elizabeth Spears.

[19] I conclude that George's interrogation of Bowman violated Sec. 8(a)(1) of the Act. Whether an interrogation of employee about union activities is violative depends on whether considering all the circumstances it is coercive. I find the interrogation of Bowman to be coercive despite the fact that she was sent to George by Cummins. If Cummins told George that Bowman had signed an authorization card, he was obligated to decline the opportunity to discuss the matter with her. A young new hire is likely to very intimidated by a one-on-one meeting with the company president to discuss her signing of a union authorization card. That Bowman was in fact intimidated is evidenced by her telling George she signed the card due to peer pressure. Moreover, the record as a whole establishes George's extreme hostility to the Union. In light of this hostility, I conclude Bowman's face-to-face discussion of why she signed an authorization card is likely to have been a very unpleasant and coercive experience. While the General Counsel did not specifically included Bowman's interrogation in the complaint, par. 10(c) generally alleges violative interrogations during this time frame, albeit by Tofilski. In any event the circumstances surrounding George's discussion with Bowman was fully litigated at trial.

[20] Respondent never had any food returned or complaints about portions from customers of the Beck/Benkert truck (Tr. 3236–3237).

which was examined, usually by Respondent's office manager, Linda Clark. Clark, who did not testify, apparently examined the food to determine whether it complied with DFC standards for quality and quantity. From this record I am unable to determine whether Benkert was in fact shortchanging customers on food portions.

In any event, only one of the alleged "portion control" violations occurred within 5 weeks of Benkert's termination and I credit Benkert's testimony that the only the timeclock violations were cited by George when discharging her.[21] Thus, I conclude further that Respondent has not established that it would have nondiscriminatorily fired Benkert for the alleged portion control incidents, even in conjunction with the timeclock infractions.

Respondent's defense rises or falls with its claim that it had a nondiscriminatory reason for firing Benkert for the timeclock infractions. On October 9, Benkert received and signed for a copy of a new DFC policy, which mandated that employees punch in at the timeclock no more than 10 minutes before their scheduled arrival time and no more than 10 minutes later than their scheduled departure time. This policy was instituted pursuant to a settlement with the Wage and Hour Division of the U.S. Department of Labor (DOL). DOL informed DFC that employees who punched in more than 10 minutes before or after the scheduled arrival or departure times would have to be paid overtime. Douglas Foods also paid employees $42,000 in backpay as a result of this settlement and incurred $18,000 in legal fees.

On October 14, Benkert punched in 13 minutes before her scheduled arrival time. That afternoon she received a memo from Office Manager Linda Clark informing her that her punch-in time was between 5:15 and 5:25 a.m. and that "anything else is unacceptable." (GC Exh. 66.)[22] On Friday, October 18, Benkert punched out 17 minutes after her scheduled departure time.[23] On October 23, she was fired for these two infractions.

Given the substantial backpay implications of its timeclock policy, I am persuaded that DFC considered compliance with the new timeclock policy to be important. However, I'm not persuaded that in the absence of retaliatory motivation, it would have fired Benkert for two instances of noncompliance. The first thing to note is that although Benkert received a sharply worded memo from Clark after the punching-in early on October 14, the memo was not a notice of disciplinary action, such as Benkert received in May (GC Exh. 63). It did not, as did the May notice, warn her that on a subsequent offense she would be subject to discharge.

Further, DFC has been a very understanding employer when dealing with its employees. Firing an employee upon a second infraction such as that committed by Benkert is totally out of character for Respondent. According to Douglas George, DFC "very seldom" terminates anyone (Tr. 3117) and "almost never" fires anyone, according to Tofilski (Tr. 1638). The most striking example of DFC's historic leniency is the case of hourly driver Lesi Slottke (GC Exh. 200). Slottke collected $635 in sales on October 18, 1995. The money was not in the DFC safe when it was checked by management. Douglas Foods gave Slottke the benefit of the doubt in accepting her claim that she deposited the money and did nothing to her other than put a note in her personnel file to the effect that she had been cautioned about turning the handle of the deposit safe all the way around. Slottke was neither suspended nor terminated, she was merely told that if she lost money again she would have to account for it.

Comparisons of Benkert's employment record with those of cook Eric Brown and driver Bonnie Gray also lead to the conclusion that Benkert's termination was discriminatory. On September 11, 1995, Brown was counseled about keeping cooked meat too long. Afterwards, on the same day, he repeated the offense. DFC gave him a warning that advised him that upon a recurrence he would be subject to discharge. On October 31, 1995, he got another warning for keeping gyros and sauce 2 days longer than Respondent allowed. Again he was threatened with possible discharge on a recurrence. On November 17, 1995, he received his third warning in little over 2 months for violations with health implications. Despite the fact that Brown refused to sign the warning, DFC took no additional disciplinary action against him (GC Exh. 183).

Gray was habitually late for work throughout her employment with DFC. She never received any discipline for this problem other than a verbal warning (GC Exh. 187; Tr. 3190–3191).

While it might not be unreasonable for DFC to have disciplined Benkert for a second failure to comply with the new timeclock policy within 1 week, termination is a rather draconian penalty for the nature of the offenses and its cost to Douglas Foods. There is no evidence that DFC ever terminated anyone else in comparable circumstances. Considering the tremendous animosity Douglas George bore towards the unionization effort at his facility and to Benkert's partner, Debra Beck, I infer the severity of the penalty exacted upon Benkert was due to a significant extent to George's antiunion animus. I therefore conclude that Benkert's discharge violated Section 8(a)(1) and (3) of the Act.

N. The General Counsel has Established a Prima Facie Case that Debra Beck was Terminated in Retaliation for her Union Activities

If there is anything in this record of which one can be 100-percent certain it is that Douglas George rues the day he hired Debra Beck. It is almost as certain that the source of his animosity towards Beck is her role in initiating and leading the Union organizing drive at DFC. Respondent intimated at trial that it believed that Beck was planted at Douglas Foods to start an organizing drive. It asked for the production of Beck's financial records in an effort to demonstrate that she was paid by the Union. Of course, even if Beck was a full-time union organizer, Douglas Foods would be forbidden from discriminat-

[21] Doug George's account of his meeting with Benkert does not contradict her account:

> I had her come in. I explained to her there were a variety of things, but the main issue right now is this timecard problem. After she was given a notice, she signed it, she understood it, she signed it, she got a copy. I gave her a warning. She didn't ask any questions. She then continued to punch out late, and I was going to terminate her. That was it. (Tr. 2930.)

[22] Several other employees received similar notices on October 14 and 25 (R. Exh. 37).

[23] Benkert and Beck allege that Benkert punched out within the specified time period, despite the fact that Respondent's timecards show that she did not. I do not believe their testimony in this regard.

ing against her on account of her union activities, *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995).[24]

On November 22, 1996, Doug George approached Beck and told her that he had sold her truck and her catering route and as a result he had no job for her. Beck asked if she could be a swing driver for DFC. George indicated he had no need for her services in that or any other regard. The day before Beck was terminated an ad ran in a local newspaper that read as follows:

CATERING
ROUTE
OPERATORS
$400–$600
If interested, please apply at
32416 Industrial Rd., Garden
City, 9 am–4 pm, Mon–Fri

313–427–8835

[GC Exh. 3.]

The ad was placed by Linda Clark, DFC's office manager (Tr. 2257). The address given in the advertisement is that of Douglas Foods. The telephone number is one for a line that rings in John Schemanske's office, which is next door to Douglas George's office and also at the desks of Linda Clark, DFC's office manager, and Donna Riggio, a DFC clerical employee. Riggio answered calls in response to this ad, and offered callers employment applications for JK Food Service (Tr. 1408, 1412, 2255–2257). I infer that the reason the route driver job at JK was not mentioned or offered to Beck was that Doug George retained substantial control over JK's operations. One does not even have to infer that George knew there was an opening at JK or that Schemanske knew that Beck had been terminated. Linda Clark, an agent of DFC, was obviously aware of both facts.[25]

Beck's truck and route were purchased on November 22, by Pam Cummins, who was also an independent operator of a cold truck route. On Monday, November 24, Beck's hot truck operated out of DFC's facility as before, with the same cook who worked with Beck since Benkert's termination, Barbara Paquette. Driving the truck was Cheryl Foster, who was hired by Cummins. Of all the employees on the hot trucks when they were sold by DFC in late 1996 and early 1997, only one was not retained by the—Debra Beck.

My finding that Beck's misfortune is something other than coincidence and that the General Counsel has established a prima facie case of discriminatory discharge arises from a number of factors. DFC was aware of Beck's leading role in the organizing drive and had on numerous occasions evidenced its hostility toward the Union and to Beck personally on account of her union activities. Some examples of the animus directed to Beck are the threat made with regard to her subpoena for the representation hearing, recurring expressions of hostility by Tofilski, Tofilski's removal of Beck from the night catering route and Respondent's increased scrutiny of her performance.[26] The timing of her termination, while the objections to the election and unfair labor practice charges were pending and the pretextual nature of reason for her termination are also factors from which I infer that a prima facie case has been established.

III. RESPONDENT HAS NOT REBUTTED THE GENERAL COUNSEL'S PRIMA FACIE CASE

A. Respondent has not Established that its Animus toward Beck Emanated from Nonprotected Conduct

The extraordinary hatred that Doug George had for Beck by the fall of 1996 is best illustrated by his account of interaction with Beck one day in October:

> A. Okay. I walked out to talk to her about something, it may have been one of the situations regarding the lack of portioning—proper portioning. She was to my right; she put her hand on my shoulder. I told her to get her hand off my shoulder or I'd hit her. I did say that.
>
> Q. Why did you say that?
>
> A. Why did I say—I was appalled that she would touch me. I was absolutely shocked that after—the situation[27] to me was very fresh in my mind, that she would touch me. And she said, oh, I doubt you'd do that. And I told her to try me.

[Tr. 2956.]

Respondent has not rebutted the General Counsel's case by showing that its animus toward Beck emanated from conduct not protected by the Act. In this regard, Doug George testified that he came to the conclusion that he was being cheated by Beck and Benkert. The opportunity for cheating arose because DFC sold hamburgers with two patties at less than twice the price of a burger with a single patty ($3 for a doubleburger; $2 for a single burger). Nonlease drivers would ask for credit from DFC for the number of two patty burgers sold. Thus if a driver reported selling more "doubleburgers" than they actually sold, they could pocket some of the revenue that should have been turned into Douglas Foods.

George asserted that Beck claimed credit for more double burgers than she could have sold given the number of hamburger patties on her truck. However, he never provided any documentation for this allegation and I am unwilling to credit this assertion without persuasive corroboration. Moreover, he conceded that when William Tofilski substituted as cook on Beck's truck, Beck and Tofilski sold more double burgers than when Benkert cooked for her. Thus, Respondent has failed to

[24] Beck belatedly conceded that she was paid by the Union for the day she responded to the subpoena for the representation proceeding. Toward the end of the hearing she agreed to send me a copy of her 1995 tax return for an in camera inspection as to whether she was on the Union's payroll during that year (Tr. 3597). This return was never provided.

Although it might be preferable if the record was clear in this regard, Beck's failure to provide these returns has virtually no significance. Even if Beck's tax returns were to show that she was a full-time union employee in 1995, it would not indicate any greater interest in the outcome of this case than is already obvious from the record. Not only might Beck be entitled to reinstatement and backpay with interest if the General Counsel prevails, her interest in the outcome of the case was demonstrated by her attendance at counsel table throughout the entire 19 days of hearing. I have already indicated that for this and other reasons, I approach much of Beck's testimony with a great deal of caution.

[25] Clark also handed out JK employment applications and interviewed job applicants for JK (Tr. 114).

[26] The removal of Beck from the night route, which significantly reduced her compensation and the increased scrutiny by DFC, are alleged as separate violations and are discussed in more detail below.

[27] This is a reference to the Union's allegation that Tofilski grabbed Brackenrich and yelled at her while making antiunion threats in July, see Tr. 2955.

prove that Beck cheated it on the double hamburgers (See Tr. 3168–3171).[28]

Respondent also intimates that Beck was a poor employee in other respects. However, the record indicates that while she was not a perfect employee, her performance was as good or better than most of DFC's drivers/cashiers. Beck's personnel file (GC Exh. 179) contains eight records of customer complaints/disciplinary warnings. Five of these occurred between January 19 and April 30, 1996. Despite whatever shortcomings are revealed in these incidents, Doug George considered Beck the best of the nonlease drivers as late as July 1 (Tr. 3263). At the end of June and the first week in July he sent Barbara Paquette and Lisa Bowman to Beck's truck so that Beck could train them as driver/cashiers.

After Doug George learned that Beck was instrumental in bringing a union organizing drive to his company, her personnel file reveals only two instances of alleged misconduct apart from the alleged cheating on the double burgers. One is an uncorroborated hearsay memorandum from driver Pamela Crout accusing Beck of providing poor service on the night route on August 7. The other is a warning on August 14, regarding the wearing of sunglasses while serving customers, which is against DFC policy.

B. DFC has Failed to Prove that it had a Legitimate Nondiscriminatory Reason to Terminate Beck

Respondent contends that Beck was terminated simply because her truck and route were sold to Pam Cummins, who decided to hire a friend as her driver/cashier, instead of retaining Beck. I conclude, however, that Respondent's explanation is pretextual. The sale to Cummins was not a bona-fide arm's-length transaction. Rather, it was a "sham" motivated in large part by DFC's desire to get rid of Beck and thwart the Union's effort to get the results of the August election reversed by the NLRB.

Cummins worked for Doug George prior to 1991 and then reestablished her business relationship with him by buying a cold truck route on August 29, 1995 (GC Exh. 88). In the 1995 agreement Cummins paid DFC $23,100 for her route. This purchase was made with a $1000 downpayment and daily payments of $50.66 for a period of at least 504 days. The $50.66 includes 12-percent-per-annum interest on the balance of the purchase price which was loaned to Cummins by DFC. As part of the agreement Cummins agreed to provide service to customers on a list prepared by DFC at times determined by DFC. She also agreed to comply with DFC standards with regards to truck sanitation and the freshness of the food sold. Further Cummins agreed to purchase 100 percent of her products from DFC and to allow DFC management to inspect her products and vehicle to assure that DFC standards were being met. In the event Cummins failed to live up to these standards, DFC retained the right to cancel its agreement with her and repossess the route and the truck.[29]

Pam Cummins was aware of the union organizing campaign and Beck's leading role through her discussions in July with Lisa Bowman. From her conversations with Tofilski and Doug George I infer she was also that aware of the hostility of Doug George to the Union and to Beck because of her involvement with the Union.

On November 22, 1996, Cummins signed an agreement purchasing DFC catering route 4 and DFC's hot truck #406, which until that date was being driven on route 4 by Debra Beck. This truck and route was purchased for $85,000, which was financed with a loan at 10 percent per annum from DFC. In contrast to her 1995 purchase, Cummins was not required to make a downpayment. Instead, she was to pay off the loan with 260 weekly payments of $416.77 (GC Exhs. 52-53). This translates to $83.35 a day, similar to what an operator would pay DFC pursuant to a lease agreement.

On the same day, Cummins also signed a supply agreement (GC Exh. 93) and a security agreement (GC Exh. 94) with DFC. In the supply agreement Cummins agreed to purchase exclusively from DFC and to "conduct her business and activities in the ordinary course and use similar methods of service, purchase, sale, management, accounting and operation as used by DFC prior to the date of this agreement." DFC's promise not to compete with Cummins was binding on DFC only for so long as Cummins continued to conduct business in a similar manner to DFC.

The security agreement gave DFC a security interest in both Cummins' truck and the catering route. Cummins was not allowed to dispose of either without DFC's prior written consent. She was required to provide DFC with whatever information and records about the truck and route as DFC requested, and to allow DFC to inspect the truck. The security agreement describes the material decline in the value of the truck and route as a default on Cummins' part. This allowed DFC to require Cummins to return the truck and all records regarding route 4 to DFC.

Cummins began operating her hot truck with Cheryl Foster as driver and Barb Paquette as cook. Foster in theory paid a $125 lease fee to Cummins. However, she remitted this fee directly to Douglas Foods and there is no indication that any of this fee ever found its way to Cummins. Neither Cummins nor Foster made any money operating their catering route. Indeed, Cummins suffered a large financial loss in the 2-1/2 months she owned the hot truck route. On February 22, 1997, Cummins wrote Doug George asking for permission to return route 4 and truck #406 to Douglas Foods and asking that DFC forgive the balance of the loan to her. Doug George agreed. On March 3, 1997, DFC sold route 4 to Karen Mitchell Kurzawa, a lease operator on a different hot truck route.[30]

Given the degree of George's animus toward Beck and the highly suspicious nature of the sale to Cummins, I conclude that getting rid of Beck was a major consideration in DFC's decision to make the purported sale. I therefore conclude that

[28] The complaint alleges that Respondent violated the Act in disciplining Beck on or about August 23, 1996. I infer that this allegation refers to the October 24 disciplinary notice regarding the double-burgers (GC Exh. 179). I conclude that this notice was discriminatorily motivated and therefore find that it violated Sec. 8(a)(1) and (3). I will order that any reference to this notice be removed from Respondent's files and that the notice and the allegations contained therein not be used against Beck in any way.

[29] DFC's control over independent operators of cold trucks was even greater than that indicated in the contract. Ann Pape owned a cold truck but operated a hot truck as a lease operator. When she sold food purchased outside of DFC from the hot truck, Doug George not only terminated her hot truck lease but effectively terminated her cold truck business by refusing to sell to her (Tr. 804–806).

[30] The sale to Kurzawa is discussed in more detail below.

Beck's discharge violated Section 8(a)(1) and (3). DFC's failure to inform Beck of the opening at JK Foods also suggests retaliatory motive in her termination.

C. Other Alleged Violations Involving Retaliation Against to Beck

The complaint alleges that DFC violated Section 8(a)(1) and (3) by increasing its scrutiny of Beck's performance or giving the impression that it was doing so, and decreasing her overtime. After the commencement of the union organizing campaign Beck began finding crumpled paper towels in her truck, which Tofilski told her were Doug George's calling card. George confirmed that this is his practice when inspecting catering trucks. I credit Beck's testimony that she began finding a lot of these towels after the start of the organizing campaign and that they were left in part to intimidate or retaliate. For one thing, her testimony is consistent with Tofilski's concession that he threatened Brackenrich with more intense truck inspections if the union drive was successful.

The General Counsel also alleges that DFC decreased Beck's overtime in retaliation for her union activities. Until the August election Beck drove an evening catering route for DFC, which resulted in substantial overtime pay. After the election, Beck no longer drove the evening route and worked very little overtime, resulting in a marked decrease in her weekly compensation.[31]

Bill Tofilski removed Beck from the evening route immediately after the election. He asked her how much sales revenue she collected one evening and she said $470. Tofilski commented adversely about the amount and said the driver on the evening before Beck had collected $500. He then said he was going to get a driver who could make money on the route. Beck told him if he thought anybody else could do a better job, she wished him good luck (Tr. 2035). A few hours later Tofilski informed Beck he had removed her from the evening route. Based on the timing of this action, the animus of DFC toward Beck and the scant justification for taking away her overtime, I conclude this was also done to retaliate for her union activities.

D. Douglas Foods violated Section 8(a)(1) and (3) in Partially Closing its Catering Service Operations and Terminating the Employment of Unit Employees in the Driver and Cook Classification

Between October 1996 and March 1997, Douglas Foods sold all its hot trucks and hot truck routes and terminated the employment of all its cooks and drivers.[32] With the exception of Debra Beck, all the drivers and cooks were hired by the purchasers, each of whom was either a former DFC supervisor or employee. I conclude that these transactions and terminations violated the Act as alleged in paragraphs 16 and 18 of the complaint. They were not arm's-length transactions and were "shams" motivated in large part by DFC's desire to thwart the Union's efforts to overturn the results of the August 1996 election and obtain a bargaining order from the NLRB.

My conclusions that these were not lawful sales emanates from their timing, while the Union's objections and unfair labor practices were pending, the extreme hostility of Respondent to the Union, evidenced in part by its unfair labor practices, and the nature of the transactions themselves.

With regard to timing, the fact that DFC sold its cold trucks and routes to Schemanske months before Beck made her initial contact with the Union lends some support to Respondent's argument that Doug George had decided to get out of the retail business before he heard of the Union and that the sale of the hot trucks and hot truck routes was unrelated to the organizing drive. However, I find this evidence is outweighed by other factors indicating unlawful motivation.

Respondent contends that the sale of the hot trucks and the cold trucks are part of the same plan to get out of the retail distribution business. DFC contends this decision was motivated in part George's heart condition. However, he had open heart surgery in 1981 and 1989, and there is no indication that his health has deteriorated since then. DFC further contends that George attempted to sell the hot trucks and hot truck routes to Schemanske in 1995 and then tried to sell them in groups or "pods" to Mary Jo Merollis in March 1996, and to his cousin, Albert Dunn, in June and July 1996. I conclude, however, that Respondent has not established that it made a bona fide attempt to sell the hot trucks and hot truck routes prior to learning of the union campaign.

The contention that the hot truck sales were long contemplated and motivated solely by legitimate business concerns is inconsistent with the spirited and concerted antiunion campaign waged by Tofilski and Doug George, *Fugazy Continental Corp.,* 265 NLRB 1301, 1303 (1982) enfd. 725 F.2d 1416 (D.C. Cir. 1984). When he spoke at the groundbreaking in April, Doug George gave no indication, as he did in September, that he was interested in selling hot trucks and hot truck routes. Moreover, DFC's purchase of a hot truck route from Barry Karras at the end of June is inconsistent with the contention that George was in the process of divesting himself of such routes.

The evidence of DFC's efforts to sell the hot truck routes prior to July 3, 1996, emanates from witnesses closely allied with Douglas Foods and is not credible. Albert Dunn apparently visited DFC's facility in July, but the fact that Doug George didn't inform him about the organizing campaign is a good indication that there was no bona fide effort by George to sell hot truck routes to Dunn.[33] Moreover, the comments of Tofilski to Tjernlund and of attorney Mamat to Radtke strongly suggest that the sale of the hot trucks was indeed related to the union campaign.

Douglas George has not found any buyers for the hot trucks who were not his former employees or supervisors. It is not clear that any of them have been able to run them profitably, other than possibly one-at-time, in a manner exactly like a presale lease operator. Moreover, the nature of the transactions are

[31] GC Exh. 178 indicates that prior to August 31, Beck worked 10 hours of overtime during a number of weeks, earning a little over $600. Occasionally, she worked more than 10 hours of overtime, sometimes little or none. After August 30, she never worked more than 3.18 hours of overtime in a week (which apparently had nothing to do with the night route) and her gross pay was generally in the $480–$490 range each week.

[32] However, it appears that DFC was operating one of these routes in the summer of 1997, after it had been returned to it by William Tofilski.

[33] I conclude that GC Exh. 51 does not corroborate Doug George's claim that he attempted to interest Dunn in buying the hot trucks before he found out about the organizing campaign. I note in this regard Dunn's testimony that the document "was Russian to me . . I can read an operating statement of my own business as well as a normal operating statement. I don't think this is an operating statement. But I basically did nothing with it." (Tr. 2547.)

a further indication that they are sham motivated by a desire to thwart the Union.

E. Sales to Bill Tofilski

There is no evidence that Douglas George considered selling any hot trucks or hot truck routes to Tofilski prior to July 22. Indeed, Tofilski's conversation with Tjernlund on July 19, and Respondent's attorney Mamat's remark to Union Attorney Radtke on July 22, strongly suggest that the sale to Tofilski was motivated by a desire to thwart the Union. Similarly, in a July 22 conversation with Brackenrich, Benkert and cook Eric Brown, Tofilski said he needed a change of jobs, not that he was talking to Doug George about buying routes (Tr. 1632).[34]

Moreover, the sales were extraordinarily irregular business transactions. In late September, Doug George announced that he was selling hot trucks and hot truck routes to Tofilski. On October 26, Ebtisam Kassouma, who been working on a truck driven by Tofilski, signed a document acknowledging that she was an employee of Tofilski's Patriot Catering, rather than DFC (Tr. 1498). Jennifer McGeough signed a similar document a few days earlier (GC Exh. 151). However, no documents relating to the sale of any hot truck routes were executed by Tofilski and George until the end of January 1997. The Board views such a delay in formalizing the sale as an indication that a transaction was not arm's-length, *Fugazy Continental Corp.,* 265 NLRB 1301 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984).

Tofilski supposedly purchased three hot truck routes for $265,000. The sale was financed by Douglas Foods at 10-pecent-per-annum interest (GC Exh. 18). Unlike his purchase of a cold truck in 1994, he made no down payment. Instead, he was to make 364 weekly payments of $1015. This translates into $67 per day, per route, very similar to the lease fees charged by DFC in the summer of 1996. The trucks also operated just as they had before the sale. They carried the DFC logo and telephone number and at least two had a DFC menu board.

Section 25 of the Asset Purchase Agreement signed by Tofilski allows him to return all trucks and routes to DFC before September 30, 1997, with all amounts owed DFC forgiven. By mid-July 1997, Tofilski had returned two of the three hot truck routes to Douglas Foods. Although Tofilski was in theory charging a lease fee to the drivers/cashiers of two of his routes, there is no indication that he collected any money from them.

Douglas Foods retained considerable control over all three routes. DFC's commitment not to compete with Tofilski is only good so long as Tofilski runs his business in the same manner as DFC did previously. Tofilski had no right to sell his "business." Indeed, he made no effort to sell the two routes on which he was not making money. He returned them to Doug George, who sold one to Dawn Alman, a cook who previously worked for DFC and then for Tofilski. The other route was apparently being operated by Douglas Foods in July 1997 (Tr. 1618–1619).[35]

[34] I conclude that this conversation was intended to make his audience concerned about their jobs and was likely to have such an effect.

[35] I conclude the sale to Dawn Alman, was also a sham transaction. She apparently bought one of Tofilski's former routes from DFC under the same terms and conditions as Tofilski.

F. Sales to Mary Jo Merollis

Mary Jo Merollis, Tofilski's sister, worked for DFC in a management position prior to 1991. From 1991 to August 1996, she was a social worker at a hospice. She testified that she had discussions with Doug George in about March 1996, about returning to DFC as either a supervisor, salesperson, or purchaser of a catering route. At about this time Merollis received a promotion from the hospice and decided to stay there.[36]

Merollis returned to DFC after the August election. In September Doug George announced the impending sales of hot truck routes to her and Tofilski. By this time she was aware of the Union's objections to the election and the filing of unfair labor practice charges. In October, Merollis began driving on hot truck route 8. At this time she told Ann Pape, the lease driver of route 8, that Pape was to cook and Merollis would drive. The contractual agreements regarding Merollis' purchase of this and two other routes were not executed until January 31, 1997 (GC Exh. 70). Thus, Merollis' exercised authority over the manner in which the route operated long before she had title to it.

A week or so later, Pape's lease was terminated by Doug George for selling pizza that had not been purchased at DFC. Even before her contracts were signed two of the trucks Merollis was buying were painted so as to obscure the DFC logo. All three, however, still carry the DFC menu board and have DFC's telephone number on the side of the truck.

Merollis initially operated solely with employees she inherited from DFC. Since May 1997, she has replaced two, who left her company. She purchased her routes for $207,500, financed at a rate of 10 percent per annum by DFC. Like her brother, Merollis made no downpayment. Instead she has 364 weekly payments of $794.94. On a per-route, per-day basis, her payments are $88, very similar to what a lease operator paid in the summer of 1996.

As in Tofilski's case, DFC maintained considerable control over Merollis' business. She cannot sell any of her routes without prior written approval of DFC (GC Exh. 72, par. 2(f)). Until July 29, pursuant to a "supply agreement" with DFC, Merollis had to purchase 75 percent of certain products from DFC and had to "use similar methods of service, purchase, sale, management, accounting and operation as used by DFC prior to the sale (GC Exh. 71, pars. 1 and 3). On July 29, 1997, Doug George released her from the supply agreement because customers whose employees were represented by the United Auto Workers, threatened to cancel her service if she continued to operate pursuant to it (GC Exh. 214).

Although Merollis has her own workers compensation insurance, product liability insurance, accountant, tax identification number, and other indicia of independence from DFC, I conclude that the totality of the record indicates that the sale to her was a sham transaction motivated in large part by DFC's desire to thwart the Union.

[36] While Merollis' testimony appears to be intended to leave the impression that the sale of hot truck routes was discussed, she never said that (Tr. 988–989). Even on its face, Merollis' testimony does not establish that the hot trucks as opposed to a cold truck route were discussed. I conclude that the record does not establish that Doug George made any attempt to sell hot truck routes to Merollis prior to learning of the Union organizing drive. In this regard I note she testified that she next contacted Doug George in "maybe June" (Tr. 992).

G. Sale to Sheila Thomas

Sheila Thomas was a lease route operator of a DFC hot truck during the summer of 1996 on route 18. She paid DFC a lease fee of about $80 per day. On March 29, 1997, she became the owner of a hot truck which she operates on the same route. Kelly Alman, who was her cook for several years before the sale, continued in this capacity. Thomas pays Alman the same salary she earned with DFC. Alman orders all the food for the truck.

Thomas continues to operate her truck out of DFC's facility and has her truck serviced with the assistance of DFC's mechanics. Her sales contract forbids her to assign, transfer, mortgage, or dispose of her truck and route without the prior written consent of DFC (GC Exh. 56). Thomas' testimony suggests far more independence from DFC than that exercised by other purchasers.[37] In view of her economic dependence on DFC, I find her testimony to be unreliable. I conclude that the sale to Thomas is part of one plan to eliminate the bargaining unit and is also a sham.

H. Hot Truck Route Sale to John Schemanske (JK Food Service)

In March 1997, Schemanske took control of hot truck route 3, which he services with one of his cold trucks. In a contract dated March 29, 1997, he agreed to pay $7000 for this route. He contracted to pay DFC $316.59 a week, a figure which includes 8-percent interest. There was no downpayment provided for in the contract. Paragraph 6 of Schemanske's contract to buy route 3, General Counsel's Exhibit 124, provides as follows:

> there are no hidden oral or other representations made between the parties. This agreement is the complete understanding of the parties. . . . No future changes in terms of this agreement shall be valid, except when reduced to writing and signed by both buyer and seller.

Despite this language JK Food Service had made no payments for this route as of July 17, 1997 (Tr. 1390). This is sufficient to establish to my satisfaction that all transactions between JK and DFC are not arm's-length.

I. Sale to Karen Mitchell Kurzawa

Karen Mitchell Kurzawa worked for DFC as a DFC lease operator from 1990 to the spring of 1996. In January 1997, she returned to DFC as a lease driver on hot truck route 3. On March 4, 1997, she purchased hot truck route 4 from DFC, under terms virtually identical to those of Pamela Cummins' purchase of the same route a couple of months earlier. The fact that Kurzawa made no attempt to negotiate a lower purchase price despite the fact that Cummins lost a lot of money on the route is one of many factors indicating a sham transaction. Kurzawa purchased a different truck, which she drives on the route. Cummins' truck is used by DFC as a spare. Kurzawa's experience suggests that one can only operate the route profitably if they drive it themselves, just as a lease operator would have done.

Almost nothing has changed in the operation of catering route 4 since it was operated by DFC and then Cummins. Kurzawa operates in virtually the same manner as a DFC lease operator. She sells food prepared by Douglas Foods' sister company, Ezzo's. Instead of retaining her gross receipts minus a lease fee, Kurzawa retains her gross receipts minus her loan payments, the amount of which are very similar to a lease fee. DFC's logo and telephone number appear on the side of her truck. The truck also displays a DFC menu board. Kurzawa charges DFC's suggested prices so that they do not differ from those charged by other trucks associated with DFC. Other DFC-affiliated trucks serve some of Kurzawa's customers at different times of the day. Kurzawa has a verbal agreement to enables her to use a DFC spare truck without charge when her truck has broken down.

The circumstances of the sale to Kurzawa lead me, in conjunction with the other evidence surrounding the hot truck/route sales, that these sales are all part of one plan motivated by a desire to avoid unionization and are sham transactions.

J. Respondent's Unfair Labor Practices Between the Filing of the Representation Petition and the Election Warrant Setting Aside the Election

The Board's policy is to set aside an election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and election. There is a limited exception to this policy, however, in situations where the misconduct is de minimis with respect to affecting the results of an election, *Video Tape Co.,* 288 NLRB 646 fn. 2, 665 (1989). In the instant case Respondent committed a number of unfair labor practices during the critical period which in no way can be deemed de minimis. Therefore, I conclude that the Union's objections have sufficient merit to set aside the election of August 23.

K. An Order Requiring Douglas Foods to Bargain with the Union is the Appropriate Remedy for the Violations that Prevented a Fair and Free Representation Election

Under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), there are two categories of cases in which the Board may issue a bargaining order. "Category I" cases are those marked by outrageous and pervasive unfair labor practices. "Category II" cases are less extraordinary cases marked by less pervasive practices which still have the tendency to undermine majority strength and impede the election process.

I conclude that a bargaining order is appropriate in the instant case on the basis of the "Category II" criteria. Therefore, I find it unnecessary to determine whether DFC's violations rise to the level of "Category I." To warrant the issuance of a bargaining order in "Category II" cases, (1) the union must have had majority support within the bargaining unit at some time; (2) the employer's unfair labor practices must have had the tendency to undermine majority strength and impede the election process; and (3) the possibility of erasing the effects of past unfair labor practices and ensuring a fair rerun election by use of traditional remedies is slight, and the once-expressed sentiment in favor of the union would be better protected by a

[37] Both Thomas and George testified that Thomas bought her truck and hot truck route for $25,000, which was paid in check and cash. Doug George testified that he deposited these checks sometime between March 29, the day Thomas paid him, and May 30. Thomas, unlike other hot truck route purchasers, did not sign a supply agreement. I am not persuaded that the testimony of Thomas and George fully and accurately represents the nature of the sale to Thomas. As the discussion below regarding John Schemanske indicates, the reality of Doug George's transactions with his close associates and employees is not always consistent the documents executed by them. Finally, one can not view the sale to Thomas in isolation. The sham nature and illegal motive for Doug George's other sales suggests that the sale to Thomas is a sham as well.

bargaining order, *CWI of Maryland, Inc.,* 321 NLRB 698, 709–710 (1996), enfd. 127 F.3d 319, 333–334 (4th Cir. 1997).

L. The Union had a the Support of a Majority of Employees in the Bargaining Unit as of July 30

The General Counsel contends that the Union had valid authorization cards signed by 19 of 33 employees in an appropriate bargaining unit at DFC as of July 3. He further contends that this satisfies the *Gissel* requirement of majority support. Respondent argues that majority support has not been established. It contends that the bargaining unit includes several employees not considered by the General Counsel. It also contends that the lease drivers who signed cards were independent contractors, not employees. Finally, DFC challenges the validity of several of the authorization cards. For the reasons stated below, I conclude that the Union had valid authorization cards for 18 of 32 bargaining unit members on July 3, 1996, the day it requested recognition from Douglas Foods.

M. Exclusion of Office Clericals

As a preliminary matter I find that Douglas Foods is bound by the July 22 Stipulated Election Agreement. In this agreement it agreed to inclusion of lease route operators and implicitly agreed that office clericals Donna Riggio and Lisa Cottenham were excluded from the bargaining unit.[38] The purpose of consent elections is to secure speedy resolution of representation issues. If a party feels strongly enough about the inclusion or exclusion of a particular group of employees, it must litigate in the representation proceeding and not wait until a unfair labor practice proceeding to raise issues that could have been resolved months or even years earlier, *Atlanta Hilton & Towers,* 278 NLRB 474, 478 (1986); *Tribune Co.,* 190 NLRB 398 (1971); *Maremont Corp.,* 325 NLRB No. 29 (1997) (not reported in Board volume). It is totally contrary to statutory scheme to allow a party to repudiate such a stipulation after an election. This is true regardless of whether the union won or is asking for a *Gissel* order in the wake of a defeat.

N. Lease Route Operators were Employees and Properly Included in the Bargaining Unit

Board precedent suggests that it may review a stipulation de novo if it violates an express statutory provision. Although I conclude that the July 22 agreement does not violate the Act, I will consider the issue of whether Respondent's lease drivers were employees to take account of the possibility that a reviewing body may conclude that a stipulation which includes persons who may be independent contractors, may run afoul of Section 2(3).

The Board applies the common law right-of-control test to determine whether individuals are independent contractors or employees within the meaning of Section 2(3) of the Act. An employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends, *Elite Limousine Plus,* 324 NLRB 992, 1001 (1997). There are factors regarding the lease route operators that suggest an independent contractor relationship. Most obvious is their method of compensation, which gave them much more control over what they earned than if they were hourly drivers. They owned the food on their truck and kept the daily profits. Lease drivers received no credit for food that was waste and bore the risk of theft from their trucks. Lease operators paid Michigan's sales tax, filed a schedule C (profit or loss from business) with their Federal income tax returns and did not have income tax withheld by DFC. Unlike hourly drivers, lease operators did not punch DFC's timeclock, or get paid vacations. They were also, unlike hourly drivers, able to extend credit to customers.

However, these considerations are outweighed by those factors that indicate employee status. First and foremost of these is that the lease operators serviced stops assigned by DFC at times determined by DFC. DFC managers, such as George and Tofilski, periodically went to their service stops to determine if they were on time and had kept their food hot. Respondent at times exercised its authority to add and subtract customers from the routes of the lease drivers without their consent. Additionally, in practice lease operators charged their customers DFC's "suggested prices."[39] These prices were listed on a menu board with the DFC logo. Although lease drivers could buy food from vendors other than DFC if they obtained their own liability insurance, none of them did so. Lease and hourly drivers both drove trucks with DFC's logo and telephone number on the side and were also subject to the same dress code.

In 1996, lease drivers were also scheduled for Saturday work by Bill Tofilski on the same basis as hourly wage drivers. The terms of their lease agreements made no provision for such work. Lease drivers were not allowed to sell or assign their leases without the approval of DFC, nor were they able to use fill-in drivers who had not been approved by Douglas Foods. In October 1996, Ann Pape was ordered to cook on hot truck route 8, rather than drive, by Mary Jo Merollis, a management employee of DFC, prior to Pape's termination as the lease operator of that route (Tr. 797–798). The trucks of lease operators were inspected by DFC and the cooks on their trucks were supervised closely by Respondent (GC Exh. 86). On balance the record establishes that the lease operators were employees of Douglas Foods.

[38] The understanding of the parties was that office clericals were excluded from the bargaining unit, even though they are not excluded by the express terms of the stipulation. This is established by the fact that Doug George and Office Manager Linda Clark left them off the *Excelsior* list, Linda Clark's notes of August 9 (GC Exh. 22) and because Respondent never contended they were part of the bargaining unit until the instant unfair labor practice proceeding (Tr. 3051–3054).

In any event, the Union's petition seeks representation of a unit of drivers, cooks, mechanics, maintenance, and store employees. It does not mention office clericals. The record establishes that the union proposal is for *an* appropriate unit. When the Union's proposed unit is appropriate, the Board does not consider whether a different unit proposed by an employer is a more appropriate unit, *P. J. Dick Contracting,* 290 NLRB 150, 151 (1988).

Although Lisa Cottenham worked for 3 of her 8 hours a day in the store, Respondent did not contend she was included in the bargaining unit until the instant ULP proceeding. I conclude it is foreclosed from doing so by its failure to raise this issue prior to the election. Indeed, I view its exclusion of Cottenham from the *Excelsior* list as an admission that she was not part of the bargaining unit. In any event, the record indicates that the Cottenham's interests were much closer to the other office clerical than to the other store employees.

[39] Hourly and lease drivers could sell food at a discount after their last scheduled stop (redlining) only with the approval of Doug George. Moreover, DFC concedes that lease operators regularly serviced stops which were visited at other times of the day by other DFC-affiliated trucks. DFC, for all practical purposes, required that lease operators charge the DFC suggested price at such stops (GC Exh. 43a, p. 20; Tr. 3000–3002).

O. Steve Barney and Ross Canfield were Excluded from the Bargaining Unit Because They were Supervisors

As is the case with Riggio and Cottenham, DFC never contended that Steve Barney, its store supervisor, or Ross Canfield, its line supervisor, were entitled to vote in the August 1996, election until this ULP proceeding. It did not include them on the *Excelsior* list. I conclude that it is precluded from arguing now that they are not supervisors and therefore part of the bargaining unit.

I would also note that on page 2 of General Counsel Exhibit 205, Barney and Canfield are described by Respondent as supervisors. They were also described as such by John Schemanske, who was DFC's general manager for several years. Schemanske also confirmed that Canfield and Barney had the authority to discipline employees and at times exercised that authority (Tr. 1405–1406). Barney, in the store, and Canfield, on the truck wash line, directed the work of other employees and contributed to their performance evaluations.

Barney and Canfield's status is similar to the "foremen/assistant supervisors" described in *Hexacomb Corp.,* 313 NLRB 983 (1994), which is cited in Respondent's brief at page 61. However, their situation is distinguishable in that the *Hexacomb* foremen only had supervisory authority when their respective supervisors were sick, on vacation or on leave (8–10 percent of the time). Canfield and Barney had the authority to discipline and direct other employees at all times they worked. On this basis I conclude they exercised sufficient independent judgment to be considered 2(11) supervisors.

Barb Paquette was not a Member of the Bargaining Unit

Respondent at page 62 of its brief argues that Barb Paquette was inadvertently omitted from the *Excelsior* list and should be included in the bargaining unit because she was clearly working for Douglas Foods prior to July 1, 1996. Although Paquette worked for DFC starting in June, she was not a "full-time or regular part time" employee until September, and therefore not properly included in the bargaining unit. She appears on none of DFC's payroll records between June and August. General Counsel Exhibit 205, prepared by Respondent, gives Paquette's hire date as September 3, 1996.

Q. Lana Celso was Included in the Bargaining Unit as of July 1996; Adrienne Kaufman was not

In a similar vein, DFC contends that Lana Celso, a cook who the General Counsel includes in the bargaining unit, and Adrienne Kaufman, a store employee excluded from the bargaining unit by the General Counsel, should not be treated disparately. Celso signed a union authorization card; Kaufman did not. Celso had not performed work for Respondent since February 1996, and was receiving workers compensation benefits in July. Kaufman went on maternity leave on April 1. Neither ever returned to work at DFC.

Nevertheless, Celso was carried on Respondent's payroll records as an active employee until December. Kaufman was listed as terminated as of April (GC Exh. 123; R. Exh. 13). In distinguishing those employees who are included and those who are excluded from a bargaining unit, the Board has drawn a line precisely on such a distinction. An employee on sick or maternity leave who has not quit or been discharged is eligible to vote in representation hearings, *Red Arrow,* 278 NLRB 965 (1986); *Sylvania Electric Products,* 119 NLRB 824, 832 (1957). One who has quit or been discharged is not eligible. Thus, Celso was in the bargaining unit in July 1996; Kaufman was not.

R.. Barry Karras and Dawn Alman were not Members of the Bargaining Unit in July 1996

DFC contends that if lease drivers are included in the bargaining unit, Barry Karras should be included although he too was not on the *Excelsior* list. Further, it argues that Dawn Alman, who worked as a cook on Karras' hot truck in July and August, should be included in the bargaining unit.[40]

Karras' situation was very different than that of the lease route drivers previously found to be employees. There was never any lease route agreement between Karras and DFC. Karras leased a truck from DFC and was supposedly building up a service route for himself in 1996. He appears to have been an independent operator.

Douglas Foods agreed to buy the route if Karras developed it into a sufficiently profitable enterprise. On June 29, Karras sold the route (No. 90) to DFC. Karras agreed to continue driving the route temporarily after the sale. He did this for about 2 weeks. Sometime in mid-July a DFC driver began operating the route. After 2 weeks Doug George concluded that Karras had misrepresented the size of the route and stopped paying him (Tr. 3060–3064, 3372–3400, 3459–3464; GC Exhs. 220; R. Exh. 31).

The record does not establish either that Karras was either a lease route operator or an employee of DFC at anytime during 1996. Respondent appears to have been paying for his brief services in July as part of its agreement to purchase his route. There is no indication of any control over the manner in which Karras performed his services either before or after June 29. I therefore conclude that Karras was not part of the bargaining unit.

Dawn Alman, the cook on Karras' hot truck, worked for Karras, not DFC, during July 1996. Unlike other hot truck cooks she was paid by Karras (Tr. 3064). General Counsel Exhibit 205, generated by Douglas Foods, lists Alman's date of hire as August 12. Therefore, she was not part of the bargaining unit in early July when the Union claims it had majority support.

S. The Record does not Establish that Francis Michael Leathed was a Member of the Bargaining after June 21

Francis Michael Leathed, a driver/cashier signed a union authorization card on June 20. Douglas George testified that on about that date he became a lease driver rather than a hourly employee. According to George, Leathed failed to show up the next day and hasn't worked for DFC since. Debra Beck asserts she saw him working at Respondent's facility until mid to late July.

Respondent's payroll records show Leathed being paid through the pay period ending May 24 (GC Exh. 108). He does not appear on their pay records for the week of May 25 through 31 and then was paid for approximately 9 hours of work during the pay period June 1 through 7. Respondent Exhibit 13 lists him as terminating his lease on May 21. I conclude that there is no reliable evidence that Leathed worked at DFC after the first week of June and that he did not work there at times when the Union claims to have represented a majority of employees in the bargaining unit.

[40] Dawn Alman and Lana Celso were the two employees whose ballots were challenged at the election (GC Exh. 2).

IV. RESPONDENT'S CHALLENGE TO THE VALIDITY OF AUTHORIZATION CARDS: SCOTT STALEY

Scott Staley's card is challenged on the grounds that it was never authenticated (R. Br. at p. 63). Ebtisam Kassouma gave a card to a line worker named Scott on April 22, the day after she obtained a signed card from Lana Celso. Although she did not know his last name, the only Scott working at DFC at this time was Scott Staley, who left DFC on August 2. Staley signed the card outside of Kassouma's presence and returned it to her. The record establishes to my satisfaction that General Counsel's Exhibit 129 was signed by Scott Staley and is valid.

> The Board has long held that an authorization card can be properly authenticated by a person other than the signer and that the latter's absence as a witness need not be accounted for . . . The Board will . . . accept as authentic any authorization cards which were returned by the signatory to the person soliciting them even though the solicitor did not witness the actual act of signing.

McEwen Mfg. Co., 172 NLRB 990, 992 (1968).

A. Mike Konkel

Mike Konkel was given an authorization card by cook Eve Orlando. He read the card (GC Exh. 84) signed it and gave it back to Orlando. She gave the card to union organizer Mark Charette on June 13. The card is dated June 12. The original card indicates that Konkel wrote something other than "6" for the month on the dateline. Regardless of whether the card was changed by Konkel or somebody else I am persuaded that he signed the card on June 12, and that it is valid.

B. Lisa Bowman (Spears)

Bowman started working for DFC on Monday, July 1. She was assigned for training to the truck on which Debra Beck was the driver/cashier and Michelle Benkert was the cook. At the urging of Beck and Benkert, Bowman signed the card and dated it July 1. Bowman testified that she signed the card several days later, probably about July 5, but backdated the card at the urging of Beck. For this reason Respondent contends that Bowman's card should not be counted in determining whether the Union had majority support as of July 3, when the representation petition was filed. Beck denies having Bowman backdate the card.

I conclude that the card was signed on July 1. Even if it wasn't, it is immaterial because there were no changes in the size of the bargaining unit between July 1 and 8, the latest the card could have been signed (R. Exh. 13). Bowman signed the authorization card in part because Beck told her that DFC would not be able to make her a lease operator against her wishes and in part because, as a single mother, she was interested in obtaining health insurance. She was sufficiently interested in the Union that she checked "yes" next to box asking if she would participate in an organizing committee (GC Exh. 174).

Shortly thereafter, at the urging of Pam Cummins, she went to talk to Doug George. She told George that "from day one" she was getting pressure to join the Union (Tr. 2450). Moreover, it seems unlikely that Beck, knowing that the Union was close to majority support, would not lobby Bowman on her first day at work. Bowman testified that she signed the card within a half-hour of receiving it, which, despite Bowman's testimony to the contrary, is likely to have been on July 1 (Tr. 2268–2270).[41]

C. Did the Union Mislead Several DFC Employees in Obtaining their Signatures on Authorization Cards?

With the exception of Robert Keith Turner, the boyfriend of union advocate Eve Orlando, Respondent elicited testimony from every card signer who still works out of its facility. Each of these witnesses testified to the effect that they were told that the cards were being solicited to obtain an election and/or so that the Union could provide them with information. DFC argues that in light of this testimony these cards should not count in determining whether the Union had the support of a majority of employees in the bargaining unit.

Each of these employees signed a card which reads as follows:

> REPRESENTATION AUTHORIZATION
>
> I hereby designate and authorize the United Food & Commercial Workers Union, Local 876, to represent me for the purpose of collective bargaining, and herewith withdraw any previous authorization given to any other organization to represent me for the above mentioned purpose.

In determining whether these cards should be counted,

> . . . employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. . . .

NLRB v. Gissel Packing Co., 395 U.S. 575, 606 (1969).

I am also mindful of the *Gissel* court's observation that

> employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1).

[Id. at 608.]

D. Valerie Baker

Valerie Baker is a cook, who had been working for Douglas George for about 10 years in the spring of 1996. In the fall of 1996, she began riding with Mary Jo Merollis, and became Merollis' employee in February 1997 (R. Exh. 13). Merollis increased her salary from $9.32 per hour to $11 per hour (Tr. 2499). Baker signed a union authorization card at a meeting at a Budgetel motel on April 11, 1996 (GC Exh. 170). Six other

[41] There are reasons to be suspicious about Beck's testimony regarding the signing of the card. She turned Pam Crout's card in to Union organizers Charette and Rekuc on July 2, the day Crout signed the card. However, she did not turn in Bowman's card until July 8. Rekuc's insertion on GC Exh. 224 regarding "Deb forgot Lisa's card" also looks suspicious. However, I do not regard Bowman to be any more of an unbiased witness than Beck. She no longer works for DFC, but obviously has strong loyalties to Cummins, who has strong loyalties to Doug George. On balance I find Beck's scenario concerning the timing of Bowman's card signing to be more plausible than Bowman's in view of the following: George's testimony that Bowman stated that Beck solicited her from "day one," the fact that soliciting Bowman on her first day is consistent with the fact that Beck gave Bonnie Gray an authorization card on her first day of Beck's truck and the lack of any motive for Beck to delay her solicitation of Bowman.

employees of DFC and JK attended the meeting, including Beck, Kassouma, and Orlando, as well as Mark Charette and Tom Rekuc from the Union.

Baker attended the meeting in part to hear what the union representatives had to say about a retirement plan. She recalls a discussion about medical benefits although she wasn't interested because she had health insurance through her husband's employer. The authorization cards were out on a table. After about 30 minutes she and other employees picked up the cards and signed them.

Baker testified that the group was told that the purpose of the cards was to find out if there were enough people interested in having an election and to allow the Union to send information to employees' homes. She didn't recall anything else being said about the cards or whether she read the language at the top of the card. Even if I were to accept Baker's testimony at face value, I would consider the card valid. There is no testimony that she was encouraged to disregard the plain language of the card. Moreover, in the absence of testimony that she didn't read the card, I presume she did.

Further, however, I conclude that Baker's testimony is not candid. Instead, it is carefully tailored to fit Respondent's theory of this proceeding. Her testimony regarding explanations given as to the cards' purpose is contradicted by Charette, Beck, Orlando, and Kassouma, who were also at the meeting. While none of these witnesses is unbiased, I regard Kassouma to be a generally credible witness and more credible than Baker with regard to what was said at the Budgetel.

Baker's lack of candor is best demonstrated by her explanation of how she came to testify at the hearing. She said that Doug George approached her the morning of her testimony and asked her to testify because her authorization card had become an issue. She then volunteered to do so. Baker denied that either George or Respondent's counsel indicated what kind of testimony would be helpful to DFC (Tr. 2494–2497). Her testimony strongly suggests the contrary, that the legal significance of her testimony was explained to her beforehand.

E. Ann Marie Alman

Ann Marie Alman was a cook on a hot truck when she signed a union authorization card on April 19 (GC Exh. 171). At the time of her testimony she worked for DFC in its store. Alman testified that she was given the card by Marty Schlacter, a cold truckdriver for JK Food Service. She says that Schlacter asked her if she'd like some information about the Union. She responded affirmatively. Schlacter said she'd have to sign the card to receive such information and told her that the card was for informational purposes only.

Debra Beck testified that although Alman got the card from Schlacter, she also explained the card to Alman and that Alman signed the card in front of her. Alman denies this.

It is not necessary to credit Beck to determine that Alman's card is valid. Alman's testimony is not credible and even more than Baker's, suggests that it is carefully tailored to assist Respondent and that the legal significance of her testimony was explained to her (Tr. 2508–2517). At hearing she read and understood the authorization language on the card without being asked, but can't recall whether she did so when she received the card. She testified that Doug George asked her to testify and that all he explained to her was that she was coming to court to verify that she signed the card. Further, she states that he asked her to testify before she volunteered that she was told by Schlacter that the card was for informational purposes only. I find her testimony regarding what Schlacter told her unbelievable. There is no credible evidence that a union adherent directed Alman to disregard and forget the language above her signature. Therefore, she and Respondent are bound by the plain language of the authorization card with regard to its validity.

F. Bonnie Gray

Bonnie Gray began working for DFC on April 15. She was assigned to Debra Beck's truck for training. Beck gave her an authorization card almost immediately. Gray kept the card a week before signing it on April 23. She read the card before she signed it and checked "yes" in response to the question whether she was willing to participate in an organizing committee. At hearing Gray, who then worked for Bill Tofilski, testified that Beck explained that the purpose of the card was to get information through the mail. She claims the authorization language on the card was not discussed. Beck testified that she explained to Gray that the purpose of the card was to have the Union represent DFC employees (Tr. 1984).

I credit Beck. I note that her testimony is consistent with what Lisa Bowman, a witness now hostile to Beck and the Union, testified Beck told her about the card.

> Q. [BY MR. SCHMIDT] How was that put to you—that the card was for an election? What did Debra Beck say?
>
> A. [BY BOWMAN] . . . The card itself was to bring forth an election. She had to have enough signatures to show interest to the union that we wanted them to come in, we wanted to make a vote, we wanted an election. That is what the cards were for, it was to show interest—to say yes, I want the union or whatever.

[Tr. 2290.]

Moreover, Gray's testimony indicates that she clearly was expressing support for the Union. Beck told her during the week before she signed that the Union might be able to get health insurance. Gray was very interested in this because she was a single mother. She also attended three union meetings after signing the card. I conclude that Gray's card is valid for purposes of determining majority support.

G. Kelly Alman

Kelly Alman was a cook on a DFC hot truck from November 1993 until March 1997, when she at least nominally became an employee of Sheila Thomas. On April 19, Kelly Alman signed an authorization card (GC Exh. 172). She checked "yes" in response to the question whether she was willing to participate in an organizing committee. At hearing she testified that she didn't read the card, that Marty Schlacter told her the card was for information and to check yes in the organizing committee box.

I need not even resolve the credibility issue between Kelly Alman and Debra Beck, who says she explained the purpose of the card to this employee. Alman's testimony that she filled out the card, including the organization committee box without reading it is not credible. Alman and DFC are bound by the unambiguous language of the card itself.

H. Sue Briscoe

Sue Briscoe, who works in the DFC store, signed an authorization card prior to April 5 (GC Exh. 85). She received an authorization card from JK driver Marty Schlacter. She lost

that card and got a second one from Eve Orlando. Briscoe's recollection of what was said to her by Schlacter and/or Orlando is very imprecise. She believes that she read the authorization language on the card before signing. Even if I were to take her recollection of what Schlacter told her at face value, it would provide no basis for considering her card invalid.

She recalled Schlacter telling her that "the purpose of signing that card was that if they had enough people interested, that they could get the union in there and tell us about the union was all about. He told me there was no obligation whatsoever that if I signed it, that I would be an active participant in it (Tr. 2200)." There is thus no basis for concluding that Briscoe was tricked into signing the card or that Schlacter told her to disregard the plain language at the top of the card.

I. Kim Brackenrich and Tammy Hildebrant

Kim Brackenrich and Tammy Hildebrant signed authorization cards at Eve Orlando's apartment on April 19 (GC Exhs. 81–82). Respondent argues that they should not be counted in determining majority support on the basis of the following testimony by Brackenrich:

> . . . then when Tammy got there, we sat at her kitchen table and she [Orlando] brought out the cards.
>
> And she told us about the union. She gave us some pamphlets and some papers, and she asked us to fill these out. She told us they would be used for, like, information purposes, address, name, and everything; they needed so many cards to get a vote in, and then by signing these cards, if the union came in, that would represent that they could represent us, because we signed these cards.

[Tr. 1949.]

Even this account does not indicate that Orlando encouraged Brackenrich and Hildebrant to disregard the plain language on the card. Moreover, Brackenrich's testimony as a whole makes it quite clear that she was interested in union representation, at least until late July. Indeed, she told Tofilski on July 19, that she was interested in the Union because she wanted health benefits for herself and her son.

Brackenrich concedes that Orlando explained the benefits of being represented before she signed the card. The fact that Hildebrant checked "yes" to the question about participating in the organizing committee indicates that she also was well aware that signing the card was an indication of a desire to have the Union represent her. Finally, I credit Orlando's testimony about her meeting with Brackenrich and Hildebrant, which is not really inconsistent with Brackenrich's. Both cards are valid.

In summary, there is no credible evidence that any of these card signers were told that the authorization card was only to get an election and/or only for the Union to obtain addresses, or in any other manner misled so as to disregard or forget the plain language above their signatures. I therefore conclude that as of July 3, the Union had valid authorization card from 18 of the 32 employees in the bargaining unit.

J. Respondent's Unfair Labor Practices had the Tendency to Undermine the Union's Majority Strength and Impede the Election Process

Soon after the filing of the representation petition, William Tofilski, DFC's second-in-command insofar as the drivers and cooks were concerned, embarked on an campaign to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. Not only did his conversations have a tendency to undermine the Union's majority strength, there is an indication that they actually had such an effect. Brackenrich's testimony makes it clear that she in fact feared for her job after talking to Tofilski on July 19. His conversation with Tjernlund also makes it clear that Tofilski tried to scare the lease drivers by suggesting, with no objective basis, that a union victory would result in a marked decrease in their income.

The effect of Tofilski's activities was reinforced by Douglas George's address to employees in which he questioned whether the "lease operator" method of compensation could continue if the Union were selected by employees. Other threats by Tofilski, such as more rigorous truck inspections were also reinforced by Respondent's President. Moreover, the union majority was undermined by George himself. The interrogation of Bowman and the pay raise given to Kassouma are examples of steps taken by George which may well have produced the union electoral defeat in a relatively small bargaining unit in which the Union enjoyed a rather narrow margin of majority support. These unfair labor practices together clearly had a tendency to undermine the Union's majority support and impede the election process.

K. Changes in the Bargaining Unit do not Render a Bargaining Order Inappropriate

Respondent contends that as the result of its sale of the hot trucks and hot truck routes, the bargaining unit now consists of a few mechanics, line employees, and Sue Briscoe in the store. The Board has repeatedly held that the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed. Thus evidence regarding changes in the composition of the bargaining unit are irrelevant when assessing the propriety of issuing such an order, E.g*., International Door,* 303 NLRB 582, 583 (1991). Moreover, as I have concluded that the sale of hot trucks and hot truck routes were unlawful sham transactions, I will order Respondent to restore the status quo ante. Therefore, the changes in the bargaining unit are not nearly as large as DFC suggests.

L. The Possibility of Erasing the Effects of Past Unfair Labor Practices and Ensuring a Fair Rerun Election by Use of Traditional Remedies is Slight

Respondent's preelection unfair labor practices were serious and affected a number of its drivers and cooks. Moreover, it is more than likely that these violations were disseminated throughout the small, close-knit bargaining unit, *Bakers of Paris,* 288 NLRB 991, 992 fn. 10 (1988). The fact that some of these violations were committed by DFC's president and others by Bill Tofilski, who still works out of DFC's facility can serve only to reinforce in the minds of the employees the lingering effects of the Respondent's violations. Even with regard to employees who did not work for DFC in the summer of 1996, these violations may live on in the lore of the shop and continue to repress employee sentiment long after many of the original members of the bargaining unit have departed, *Salvation Army Residence,* 293 NLRB 944, 945 (1989).

DFC's postelection conduct is also relevant in determining the appropriateness of a bargaining order, *Tufo Wholesale Dairy,* 320 NLRB 896 (1996); *Eddyleon Chocolate Co.,* 301 NLRB 887, 891 (1991); *Salvation Army Residence,* supra. It indicates continued hostility to employee rights and a substantial likelihood that Respondent will engage in illegal activities

during a rerun campaign. Moreover, the postelection violations in this case are precisely the type that are likely to repress employee sentiment even among those who did not work for DFC at the time of the last election. The discharges of Beck and Benkert are likely to be particularly inhibiting to a fair rerun. The subtle manner in which DFC rid itself of both these employees is cause to make anyone think twice about supporting the Union. This is so even if Beck and Benkert are reinstated with backpay pursuant to the Board's traditional remedies.

The subtlety of postelection sales of the hot trucks and hot truck routes, particularly to Tofilski and Cummins, and the possibility that such sales could cost union supporters their jobs, also is likely to make employees hesitate in casting their ballots freely in a rerun election. The wholly unbelievable testimony of virtually every card signer who still works at Respondent's facility also suggests some degree of continued intimidation. Finally, Mary Jo Merollis gave three bargaining unit cooks a raise from $9.32 per hour to $11 per hour in early 1997 (Tr. 1023–1024, 2499). These raises substantially decrease the possibility of a fair rerun election, *Skaggs Drug Center,* 197 NLRB 1240 (1973).

It is not the Board's policy to require that benefits, even if granted unlawfully, be rescinded, and they are difficult to remedy by traditional means. In view of all the above-mentioned considerations I find that a *Gissel* bargaining order is warranted.[42]

CONCLUSIONS OF LAW

1. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Creating an impression among its employees that their union activities were under surveillance.

(b) Threatening employees with adverse consequences if they supported the Union.

(c) Coercively interrogating its employees about their union activities and the union activities of other employees.

(d) Suggesting that it would be futile for employees to select the Union as their bargaining representative.

(e) Threatening employees with adverse consequences if they honored a Board subpoena.

(f) Giving an employee a pay raise 3 weeks before the NLRB election and while doing so suggesting to her that she vote against the Union.

2. Respondent violated Section 8(a)(1) and (3) of the Act by:

(a) Increasing the scrutiny of, or creating the impression of increasing the scrutiny of Debra Beck's work performance.

(b) Decreasing Debra Beck's overtime.

(c) Issuing Debra Beck a disciplinary notice on or about October 24, 1996.

(d) Laying off Debra Beck.

(e) Discharging Michelle Benkert.

(f) Closing or partially closing its hot truck catering operations.

(g) Terminating the employment of some or all of its hot truckdrivers and cooks.

3. At all times since July 3, 1996, the Union has been the exclusive representative of all employees in an appropriate bargaining unit consisting of Respondent's full-time and regular part-time drivers, cooks, mechanics, maintenance and store employees, including lease route operators. Respondent's subsequent unfair labor practices were so serious and substantial in nature that the possibility of erasing their effects and conducting a fair and free representation election by use of traditional remedies is slight; and consequently, the employees' sentiments regarding representation having been expressed through union authorization cards would on balance be protected better by issuance of a bargaining order than by traditional remedies.

4. Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Debra Beck and Michelle Benkert, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent must also make Beck whole for lost overtime since August 1996.

Respondent, having discriminatorily closed its hot truck catering route operations and terminated its hot truckdrivers and cooks, is ordered to reestablish these operations and offer reinstatement to all hot truckdrivers and cooks who were terminated at the time of and/or as the result of the cessation of these operations. These employees shall be made whole for any loss of earning and other benefits in the same manner as Debra Beck and Michelle Benkert.

Restoration of the status quo typically is the appropriate remedy for a discriminatorily motivated change in operations, *Adair Standish Corp. v. NLRB,* 912 F.2d 854, 867 (6th Cir. 1990). An order requiring such restoration is appropriate unless the respondent can demonstrate that restoration would be unduly burdensome, *Joy Recovery Technology Corp.,* 320 NLRB 356 (1995), enfd. *NLRB v. Joy Recovery Technology Corp.,* 134 F.3d 1307 (7th Cir. 1998). Respondent has not met its burden in this regard. Since the hot trucks continue to operate out of DFC's facility in virtually the same manner as they did prior to the sale, restoration would largely involve only paper transactions. George alleged that it would cost DFC $750,000 to buy back its hot truck routes. However, the record contains no explanation of why this would be so. With the possible exception of Sheila Thomas, none of the purchasers has paid him anything other than a weekly fee, which was functionally the same as the lease fee employees paid prior to the sale. One must assume that the purchasers received something of value in exchange for these weekly payments. It is therefore unlikely that DFC would have to return these payments to the purchasers of the hot truck routes.

Respondent is also ordered to recognize and, on request, to bargain with the Union as the exclusive bargaining representative of its employees in a unit consisting of all full-time and

[42] In view of the *Gissel* order Respondent will have to bargain with the Union with regard to the cooks' compensation. It cannot rescind the wage increases in order to discourage support for the Union and must bargain in good faith in regard to any changes in the pay of the cooks now working for Merollis.

regular part-time drivers, cooks, mechanics, maintenance, and store employees, including lease route operators.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

The Respondent, Douglas Foods Corp., Garden City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating an impression among its employees that their union activities are under surveillance.

(b) Threatening employees with adverse consequences if they support the Union.

(c) Interrogating employees about their union activities or the union activities of other employees.

(d) Suggesting that it would be futile to select the Union as their bargaining representative.

(e) Threatening employees with adverse consequences if they honor a Board subpoena.

(f) Firing, laying off, reducing the hours, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage membership in any labor organization.

(g) Failing and refusing to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate collective-bargaining unit.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, reestablish and resume its hot truck catering operations as they existed prior to October 1, 1996, and offer immediate and full reinstatement to all hot truckdrivers and cooks terminated by Respondent at the time its hot truck routes were sold and/or as a result of these sales.

(b) Make whole any hot truckdriver or cook for any loss of earnings he or she may have sustained by reason of Respondent's discriminatory termination of his or her employment;

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers, cooks, mechanics, maintenance and store employees, including lease route operators.

(d) Within 14 days from the date of this Order, offer Debra Beck and Michelle Benkert full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Debra Beck and Michelle Benkert whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision. With regard to Beck this includes compensation for lost overtime pay beginning with her removal from the night route in August 1996.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the unlawful disciplinary notice given to Debra Beck on October 24, 1996, and notify Debra Beck, Michelle Benkert and any other affected hot truckdrivers or cooks in writing that this has been done and that the discharges and, in Beck's case, the October 24 disciplinary notice, will not be used against them in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Garden City, Michigan facility, copies of the attached notice marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 1996.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(j) IT IS FURTHER ORDERED that in Case 7–RC–20872, the Union's objections to the August 23, 1996 election are sustained and the election is set aside.

(k) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[44] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."